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OF

ENGLISH CIVIL LAW

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BOOK II, PART III

LAW OF QUASI-CONTRACT AND TORT

BY

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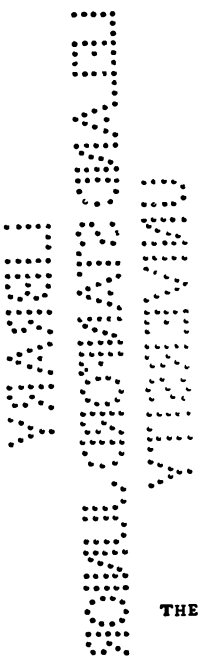

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SCHEME OF THE WORK

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PREFACE

IT was originally intended that the whole of the Law of Torts (as well as that of Quasi-contract) should be included in this volume. But, as the work of preparing the volume proceeded, it became clear that this purpose could only be achieved at the cost of considerable delay, and with the result of making the volume unusually large. The pages which follow contain therefore only, of the Law of Tort, the General Part and the particular torts relating directly to property. Torts in respect of the person, the reputation, domestic and contractual relations, *e. g.* assault, libel, slander, false imprisonment, malicious prosecution, etc., are left for the succeeding volume; which will, it is hoped, appear in the spring of next year.

The editor and his colleagues have been gratified by the impatience with which the issue of new volumes is expected by subscribers; but they venture to suggest that the complaints on the subject of delay are a little unreasonable. Each paragraph of the work, after being drafted by the author of the volume, is submitted to and criticized by the editor, then discussed on two different occasions at a meeting of all the authors, then prepared for the press by the editor, and finally revised in proof by editor and author. It is evident that this process, though calculated to avoid mistakes and ensure deliberation, must consume considerable time; especially as the editor and his colleagues live fifty miles apart, and are all busy men.

This explanation ought also, in justice, to be taken into account in attributing to the nominal author of any particular

volume personal responsibility for all the details of that volume. It must be remembered that the author, in deference to the majority of his colleagues, sometimes accepts an amendment with which he may not be able personally to agree. In such a case, it is clear that the responsibility should be corporate, rather than individual. For example, in the volume which follows, the good-nature and modesty of Mr. Miles have, on more than one occasion, induced him to modify his views, or at least his phrasing, at the request of his colleagues.

With regard to the general character of the Law of Tort, the editor has felt, as the work proceeded, that the process which he ventured to suggest (*see* Preface to Book II, Part I) as the birth-process of the Law of Contract, is repeating itself at the present day with regard to the Law of Tort. First appear in legal history a series of more or less disconnected torts; then, by slow degrees, a generalizing process takes place, which results in the establishment of certain principles applicable to the general idea of a tort, as a wrong independent of contract. These general principles are stated in Section 1 of the volume which follows; but it will be evident from a perusal of them that (if the statement is complete) the generalizing process referred to has as yet developed much less than in the corresponding department of Contract. A certain type of case, of which *Heaven* v. *Pender*, *Exchange Telegraph Co.* v. *Gregory*, and *National Phonograph Co.* v. *Edison-Bell Co.* are examples, seems to show that some of our judicial authorities are inclined to chafe at the slowness of the process. But we are yet very far from the magnificent vagueness of the German Civil Code; which disposes of the Law of Tort in a score or two of short paragraphs.

It is not the business of this work to criticize the Law of England, but to state it. Still, statement is occasionally itself

criticism; and the Editor cannot help calling attention to one rather amusing example of the inability of the common law to perform the simple process of dichotomy. It might have been assumed, that a classification of animals into (a) wild and (b) tame or domestic, would have exhausted the catalogue. The Law of England, however, at any rate on the important subject of Liability for the Acts of Animals (Tort, Section 1, Title V), has achieved the triumph of discovering a third species. For, as will readily be seen on a perusal of the Title, animals in respect of which an Englishman may incur liability fall into *three* classes, *viz.*:

(i) Wild animals (*feræ naturæ*).
(ii) Domestic animals (*domitæ naturæ*).
(iii) Dogs.

The editor wishes to state that, although some later cases have been added as the sheets were passing through the press, the volume does not profess to bring the law down later than the end of the year 1907.

EDWARD JENKS.

25th March, 1908.

TABLE OF STATUTES

TABLE OF CASES

ERRATA AND ADDENDA IN BOOK I AND BOOK II (PARTS I AND II)

BOOK I

Page 6. § 15 (c). This sub-clause must now be treated as substantially modified by section 4 of the Trades Disputes Act, 1906, which practically exempts Trade Unions from its provisions. (*See* § 755 in this volume.)

Page 22. § 51. The onus of proving the affirmative of the second question rests on the plaintiff; even when the first has been ruled in his favour (*Nash* v. *Inman* (1908) XXIV T. L. R. 401).

Page 26. § 63 (note). The decision of the House of Lords in *Villar* v. *Gilbey* [1907] A. C. 139, has restored the correctness of the note, which had been impugned by the judgment of the Court of Appeal. But the limits of the rule stated in § 63 are well brought out by the decision of the C. A. in *Re Salaman* [1907] 2 Ch. 46.

Page 60. § 141 (c). The reference to the Conveyancing Act, 1882, properly belongs to sub-clause (*c*), not to sub-clause (*b*).

Page 77. § 165. Add at end of the clause: "Time does not begin to run in favour of a person who is outside the United Kingdom (which for this purpose includes the Channel Islands) until his return thereto" (4 & 5 Anne c. 3 (or 16), s. 19; Mercantile Law Amendment Act, 1856, s. 12).

Page 80. § 174. Add note: "Probably, where trustees are not entitled to plead the Statutes of Limitation (*see* § 164), there is no limit to the extent of arrears which may be recovered against them personally (*Edwards* v. *Warden* (1876) L. R. 1 App. Ca. 281). But this case was decided before the Act of 1874 came into operation; and section 10 of that Act may be held to

bar the remedy after six years in respect of payments *charged on land*, even against trustees who are not entitled to plead the statute (*Hughes* v. *Coles* (1884) 27 Ch. D. 231)."

BOOK II, PART I

Page 99. § 221 note (a). In the reference to *Caton* v. *Caton*, after "1 Ch. App.," insert: "at p. 147."

Page 139. § 319. Add as a note: "The mere fact that he has claimed damages on the indorsement of his writ, does not bind the plaintiff in his statement of claim (*Lewis* v. *Durnford* (1907) XXIV T. L. R. 64)."

BOOK II, PART II

Page 304. § 687 note (a). For "Marine Insurance Act, 1788, s. 1," substitute "Marine Insurance Act, 1906, s. 23," and omit the clause in brackets.

Page 304. s. 688 note. For "Marine Insurance Act, 1745, s. 1," substitute "Marine Insurance Act, 1906, ss. 4, 5."

Page 305. § 688 (b) line 3. For "risk" read "loss." And for *Rhind* v. *Wilkinson*, substitute "Marine Insurance Act, 1906, s. 6."

Page 306. § 691. The query stated in the note to this § must now be answered in the affirmative (*Re Quicke's Trusts* (1907) XXIV T. L. R. 23).

Page 308. § 696. To the note add: "Marine Insurance Act, 1906, s. 4 (1)."

BOOK II

OBLIGATIONS

PART III

OBLIGATIONS ARISING FROM QUASI-CONTRACT AND TORT

A—QUASI-CONTRACT

Definition

707. When the law imposes upon one person, on the grounds of natural justice, an obligation towards another similar to that which arises from a true contract, although no contract, express or implied, has in fact been entered into by them to that effect, such obligation is said to arise from Quasi-contract.

Moses v. *Macfarlane* (1760) 2 Burr. 1009, *per* Lord Mansfield.

[It is somewhat difficult to find a special place, in the scheme of English Law, for a department of Quasi-contract which shall be distinct, on the one hand, from Contract, and, on the other, from Tort. Quasi-contractual obligations are really imposed by law as the result of a desire to do justice between parties who have been brought into relation with one another, where such relation is not strictly one of contract. For example, if A, under a mistake of fact, pays money to B which he does not owe him, A certainly ought to be able to recover it. But on what technical ground? B has not promised to repay the money; indeed the implication is that in all probability he received it intending to keep it. An obvious suggestion is: that B has been guilty of a wrong (or Tort) in withholding money which does not belong to him; and, but for

technical reasons, it is quite possible that English law would have taken this view. But the position hardly appeared to satisfy the legal conception of a Tort. And so English Law, unable to class such obligations either under Contract or under Tort, classes them under Quasi-contract; as closely, though not completely, resembling contractual obligations. The truth of this statement, as well as the test of its application, is to be found in the fact that, under the old system of pleading, such obligations were enforced by the action of Assumpsit, like true contractual obligations. The scantiness of the English Law of Quasi-contract is due to two causes; one substantial, the other technical. The one is the highly formal character of our early law, with its sharp distinction between law and morality; an example of which is the fact that the voluntary benefactor or agent (*negotiorum gestor*) has, even now, no action to recover his actual expenditure, though that expenditure may have resulted in pecuniary benefit to the person on whose behalf he acted. The second cause is the fact, that English Law prefers to class a good many obligations, which are really quasi-contractual, among obligations arising from *implied promises in contracts*. For example, the various obligations of the innkeeper, the agent, and the bailee (*ante*, Book II, Part II) are treated as arising out of implied promises; though it would be a violent straining of probability to pretend that the minds of the parties adverted to them on each occasion of entering into the contract of which they are deemed to form a part. The fact that there is such a contract, makes it convenient to treat them as parts of it. The need for the separate recognition of a quasi-contract only arises, when there is no true contract with which the obligation which it is desired to enforce can be connected.]

Remedies

708. The consequences of a breach of such obligation are, generally speaking, the same as those attendant upon a breach of contract.

[The best proof of the truth of this statement is, probably, the fact that, in the old system of pleading, the appropriate remedy for breach of quasi-contract was, as above stated, the action of Assumpsit. There is, however, it is believed, no case in which a remedy in the nature of specific performance would lie to compel the fulfilment of a quasi-contractual obligation.]

Money paid to defendant's use

709. Where one person has been compelled, under threat or reasonable apprehension of legal proceedings or legal restraint of goods, to pay a sum of money or do any other act which another person is primarily liable to pay or perform, the latter is bound to indemnify the former in respect of all expense properly incurred by him in respect of such payment or performance.[a] But (subject to § 710) there is no such obligation in respect of a voluntary payment or act; even though the person on whose behalf the money has been paid, or the act done, has received the benefit of such payment or act.[b]

(a) *Duncan* v. *Benson* (1847) 3 Exch. 644.
Roberts v. *Crowe* (1872) L. R. 7 C. P., at p. 637.
Edmunds v. *Wallingford* (1885) 14 Q. B. D., at pp. 814–5.
Tubbs v. *Wynne* [1897] 1 Q. B. 74.

(b) *Falcke* v. *Scottish Imperial Insurance Co.* (1886) 34 Ch. D., at p. 248.

[This is the principle upon which rest the obligation of a joint-promisor to contribute to a payment by his co-promisor (*ante*, Book II, Part I, § 365), the obligation of a principal debtor to indemnify his surety (*ante*, Book II, Part II, §§ 664, 665), and the obligation of the purchaser of an equity of redemption to indemnify his vendor from the mortgage debt (*Waring* v. *Ward* (1802) 7 Ves., at p. 337). It should be noticed, that there is no obligation unless the defendant was himself bound to satisfy the liability discharged by the plaintiff (*Bonner* v. *Tottenham and Edmonton Society* [1899] 1 Q. B. 161).]

Loan to agent

710. When money improperly borrowed by an agent in excess of his authority has been applied in payment of debts which the principal is legally bound to pay, the lender will be entitled to that extent to stand in the

same position as if the money had been borrowed by the principal.

Blackburn Building Society v. *Cunliffe* (1882) 22 Ch. D. 61.
Bannatyne v. *MacIver* [1906] 1 K. B. 103.

Money paid by mistake

711. Money paid under a *bonâ fide* mistake of fact may be recovered by the payer from the payee, in the circumstances described in Book I, § 91.

Funeral expenses

712. The husband of a deceased woman, and the personal representatives of any deceased person, are liable to re-imburse to any person who, in circumstances of necessity, has undertaken the charges of the deceased's funeral, the reasonable amount of such charges.[a] But the liability of personal representatives as such is limited by the amount of assets of the deceased which they have received, or, with due diligence, might have received.[b]

(a) *Rogers* v. *Price* (1829) 3 Y. & J. 28.
Bradshaw v. *Beard* (1862) 12 C. B. N. S. 344.
(b) *Brice* v. *Wilson* (1834) 3 L. J. K. B. (N. S.) 93.

Money received to plaintiff's use

713. Where one person has received money which justly and equitably belongs to another, the latter is entitled to recover the same from the former, as for money received to his use.

The chief examples of this rule are: —

(i) An insurer who has paid for a loss can recover against the insured moneys subsequently received by the latter from third parties in respect of the loss.

Dufourcet v. *Bishop* (1886) 18 Q. B. D. 373.
West of England Co. v. *Isaacs* [1897] 1 Q. B. 226.

[There is no claim unless the sum received from the third party represented a legal liability (*Burnand* v. *Rodocanachi* (1882) L. R. 7 App. Ca. 333).]

(ii) When money or goods have been fraudulently or forcibly obtained by the defendant from the plaintiff, the latter may waive the tort and sue for the money or the proceeds of the sale of the goods.[a] This rule does not entitle a person whose land has been wrongfully occupied to sue for use and occupation.[b]

(a) *Neate* v. *Harding* (1851) 6 Exch. 349.
Holt v. *Ely* (1853) 1 E. & B. 795.
Fraser v. *Pendlebury* (1861) 31 L. J. C. P. 1.
(b) *Churchward* v. *Ford* (1857) 2 H. & N. 446.

(iii) When the defendant has improperly obtained from third parties the payment of debts due to the plaintiff, the plaintiff is entitled to recover from him the amount so obtained.

Andrews v. *Hawley* (1857) 26 L. J. Exch. 323.

[*Quære*, is the plaintiff bound to elect between the defendant and the original debtor? Or can he sue both?]

(iv) A joint-tenant or tenant-in-common, who has received more than his just share of the rents or profits of land, is liable as bailiff, in respect of the excess, to an action of account by the other joint-tenants or tenants-in-common [a]; but the mere fact that he has enjoyed more of the benefit of the land, or made more by its occupation, will not *per se* render him liable to account.[b]

(a) 4 & 5 Anne (1705) c. 3, s. 27.
(b) *Henderson* v. *Eason* (1851) 17 Q. B. 701.

[Does the statute apply to co-parceners, or to co-owners of chattels?]

(v) When one party to a contract has paid money to another in respect of an executory consideration which wholly fails through the default of the latter, the former may rescind the contract and recover from the latter the amount so paid.

Wilkinson v. *Lloyd* (1845) 7 Q. B. 27.
Wright v. *Colls* (1849) 8 C. B. 150.
Moeser v. *Wisker* (1871) L. R. 6 C. P. 120.

[This rule has no application to cases of impossibility of performance; and is independent of the plaintiff's claim for damages in respect of breach of contract. (See Book II, Part I, §§ 294–303.)]

(vi) When money or goods are deposited in the hands of a stakeholder to abide the event of a valid transaction, the party in whose favour

the event is determined may recover them from the stakeholder; but without interest.

Harington v. *Hoggart* (1830) 1 B. & Ad. 577.
Parr v. *Winteringham* (1859) 1 E. & E. 394.

(vii) When money or goods have been entrusted to any one for a particular purpose, other than such as is described in sub-clause (vi), they may be recovered at any time before they have been parted with by the holder in due fulfilment of his instructions. This rule applies, even though the purpose is illegal; at any rate, if the person entrusting the property is *in minori delicto*.

Hastelow v. *Jackson* (1828) 8 B. & C. 221.
Taylor v. *Bowers* (1876) 1 Q. B. D. 291.
Barclay v. *Pearson* [1893] 2 Ch. 154.
O'Sullivan v. *Thomas* [1895] 1 K. B. 698.
Hermann v. *Charlesworth* [1905] 2 K. B. 123.

Quantum meruit

714. Where one party to a contract, whether divisible or not, is entitled by reason of the default of the other to treat it as at an end, he may recover from the party in default for the work and labour done or the goods supplied under the contract.

Mayor v. *Pine* (1825) 3 Bing. 285.
Planché v. *Colburn* (1831) 8 Bing. 14.
Withers v. *Reynolds* (1831) 2 B. & Ad. 882.
Clay v. *Yates* (1856) 1 H. & N. 73.

Account stated

715. When an account has been stated, either orally or in writing, admitting the indebtedness of the

party stating it to the party to whom it is stated, in a certain sum or sums of money, the account is treated as evidence of a promise implied in law by the party rendering the account to pay the whole sum stated to be due, and each item thereof, at the time and subject to the conditions (if any) mentioned in the account.[a] And where there have been mutual dealings between the parties, and an account has been stated between them, showing a balance due from one of the parties to the other, the latter will be entitled to recover the amount of the balance.[b]

(a) *Highmore* v. *Primrose* (1816) 3 M. & S. 65.
Roper v. *Holland* (1835) 3 A. & E. 99.
Irving v. *Veitch* (1837) 3 M. & W., at p. 107.
Lane v. *Hill* (1852) 18 Q. B. 252.
(b) *Wray* v. *Milestone* (1839) 3 M. & W. 21.

[An account stated is only evidence of liability; and it may be rebutted by proof of the invalidity of all or any of the items (*Lubbock* v. *Tribe* (1838) 3 M. & W. 612).]

Action on judgment

716. Where a Court (British or foreign), having jurisdiction over the parties and subject-matter, has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, and may (subject to § 717) be enforced by action.[a] But, in the case of a foreign judgment, the defendant may raise the defence that the judgment was obtained by fraud, or that the proceedings in the

foreign Court offended English views of substantial justice.[b]

(a) *Walker* v. *Witter* (1778) 1 Doug. 1.
Williams v. *Jones* (1845) 13 M. & W. 628.
Hodsoll v. *Baxter* (1858) E. B. & E. 884.
Godard v. *Gray* (1870) L. R. 6 Q. B. 139.
Schibsby v. *Westenholz* (1870) *ibid.* 155.
Emanuel v. *Symon* (1906) XXIII T. L. R. 94.
(b) *Vadala* v. *Lawes* (1890) 25 Q. B. D. 310.
Pemberton v. *Hughes* [1899] 1 Ch., at p. 790.

[But a foreign judgment does not create a debt of record in an English tribunal; and so it is sometimes spoken of as merely "evidence of the debt" (*Walker* v. *Witter*, *ubi sup.*; *Hall* v. *Odber* (1809) 11 East, 118). A plaintiff, it may be observed, has usually a more speedy remedy on an English judgment than the bringing of an action; and, by the Judgments Extension Act, 1868, judgments of the superior courts of Scotland and Ireland can by registration be placed on the same footing in all parts of the United Kingdom. A similar privilege has been conferred on judgments of inferior jurisdiction in the United Kingdom by the Inferior Courts Judgments Extension Act, 1882.]

County Courts

717. No action may be brought in a County Court on any judgment obtained in the High Court;[a] nor may any action be brought on a judgment of a County Court.[b]

(a) County Courts Act, 1888, ss. 63, 151.
(b) *Berkeley* v. *Elderkin* (1853) 1 E. & B. 805.
Austin v. *Mills* (1853) 9 Exch. 288.

[The reason for the latter rule, which is applicable only to the modern statutory County Courts, is stated to be: that to allow an action to be brought on such judgments would defeat the object of the Acts, which have provided other methods for enforcing them.]

Official dues

718. Where by statute, valid custom, or official duty, one person is required to pay a sum of money

to or for the benefit of another, an action will lie to compel such payment; unless the contrary is expressed or implied in the statute, custom, or document creating the office.

Case of the Marshalsea (1613) 10 Co. Rep. 75 b.
Anonymous (1704) 6 Mod. Rep. 27, per Holt, C. J. } (statute)
City of London v. *Goree* (1677) 3 Keb. 677.
Speake v. *Richards* (1618) Hob. 206 (office).
Shuttleworth v. *Garnet* (1687) 3 Mod. 240.
Mayor of Newport v. *Saunders* (1832) 3 B. & Ad. 411. } (custom).

Liability undertaken at defendant's request

719. Where one person has, at the request and on the behalf of another, done an act imposing liability on the person acting, the latter is entitled to be indemnified by the person on whose behalf he acted, in respect of such liability;[a] unless the act in question was manifestly illegal,[b] or unless the person so acting was under a duty to perform the act independently of such request.[c]

(a) *Birmingham &c. Land Co.* v. *L. & N. W. R.* (1886) 34 Ch. D., at pp. 272, 275.
Sheffield Corporation v. *Barclay* [1905] A. C., at p. 397.
(b) *Shackell* v. *Rosier* (1836) 2 Bing. N. C. 634.
Burrows v. *Rhodes* [1899] 1 Q. B. 816.
(c) *Collins* v. *Evans* (1844) 5 Q. B. 820. (But it must be carefully noted that, in order to escape liability on this ground, the act which the plaintiff was under a duty to do must be really, not merely apparently, the same as that which the defendant requested him to do. *E. g.*, if the plaintiff is only under a duty to register genuine transfers, and the defendant induces him to register a forged transfer, the defendant will be liable, even though he acted *bonâ fide*. *Sheffield Corporation* v. *Barclay*, *ubi sup.*)

Voluntary agency

720. Subject to the law maritime on the subject of salvage, and to the rights of trustees and mort-

gagees in respect of moneys expended by them in the preservation of the trust or mortgaged property (see *post*, Book III), a person who has voluntarily expended money, labour, or materials in the preservation or improvement of the property of another, or in the conduct of his affairs, has no claim to indemnity on the principle of *negotiorum gestio*.

Falcke v. *Scottish Imperial Co.* (1886) 34 Ch. D., at p. 248.

Directors Liability Act

721. A person who has been made liable to payment, as a director or promoter of a company, for an untrue statement in a prospectus or notice, under the Directors Liability Act, 1890, is entitled to recover contribution, as in cases of contract, from any other person. or from the representatives of any other person, who, if sued separately, would have been liable to make the same payment.

Directors Liability Act, 1890, s. 5.
Shepheard v. *Bray* [1906] 2 Ch. 235.

[But this right cannot be exercised if the claimant was, and the person from whom contribution is sought was not, guilty of fraudulent misrepresentation (Companies Act, 1907, s. 33).]

NOTE

It may very well be urged that the liability of a minor, and the estate of a lunatic, to pay for necessaries (Book I, §§ 50, 66), and the liability of a trustee for breach of trust, as well as the liability of a beneficiary of full age and capacity to indemnify his trustee, are all founded on *quasi-contract*. (See *Re Rhodes* (1890) 44 Ch. D., at p. 105.) But these subjects will be more conveniently treated under their several heads elsewhere.

B—TORT

SECTION I

GENERAL

TITLE I—PRELIMINARY

Definition

722. A tort is a breach of duty (other than a contractual or quasi-contractual duty) creating an obligation, and giving rise to an action for damages.

Actual damage

723. As a rule, no act or omission amounts to a tort, unless it causes appreciable damage in fact. But in actions for trespass[a] to land or to goods or to the person (including false imprisonment), or for conversion of chattels, or for libel, or for slander where the words are actionable *per se*, and in cases where the denial of a public right gives rise to an action by an individual,[b] appreciable damage in fact need not be proved.

(a) *Entick* v. *Carrington* (1765) 19 St. Tri. 1030.
Rogers v. *Spence* (1844) 13 M. & W. 571.
(b) *Ashby* v. *White* (1703) 2 Ld. Raymond, 938.

[With respect to incorporeal hereditaments, no general rule prevails. In some cases, an infringement of itself gives rise to an action; in others, proof of damage is essential. For the former proposition see *Wilson* v. *Mackreth* (1766) 3 Burr. 1824 (exclusive profit in

the soil); *Hobson* v. *Todd* (1790) 4 T. R. 71; *Robinson* v. *Hartopp* (1889) 43 Ch. D. 484 (commons); *Holford* v. *Bailey* (1849) 13 Q. B. 426 (several fishery); *Embrey* v. *Owen* (1851) 6 Exch. 353; *Macartney* v. *Londonderry & Co.* [1904] A. C. 301 (water); *Kidgill* v. *Moor* (1850) 9 C. B. 464; *Thorpe* v. *Brumfitt* (1873) L. R. 8 Ch. 650 (rights of way); *Brocklebank* v. *Thompson* [1903] 2 Ch., at p. 348 (local rights); *Harrop* v. *Hirst* (1868) L. R. 4 Exch. 43 (proprietary right). *Contra*, *Angus* v. *Dalton* (1881) L. R. 6 App. Ca. 740; *Darley Main Colliery Co.* v. *Mitchell* (1886) L. R. 11 App. Ca. 127 (rights of support); *Colls* v. *Home & Colonial Stores* [1904] A. C. 179 (rights of light). These cases will be considered under their appropriate headings.]

Remoteness of damage

724. When the damage is the gist of the action, the damage alleged must be the "natural and probable" consequence of the defendant's conduct;[a] but its immediate cause may be the conduct of others, or even (subject to § 732) of the plaintiff,[b] if its effective or decisive cause was the conduct of the defendant.

(a) *Glover* v. *L. & S. W. Ry. Co.* (1867) L. R. 3 Q. B. 25.
Hill v. *New River Co.* (1868) 9 B. & S. 30.
Sharp v. *Powell* (1872) L. R. 7 C. P. 253.

(b) *Lynch* v. *Nurdin* (1841) 1 Q. B. 29.
Clark v. *Chambers* (1878) 3 Q. B. D. 327.
Englehart v. *Farrant* [1897] 1 Q. B. 240.
McDowall v. *G. W. Ry. Co.* [1903] 2 K. B. 331.

[By "natural and probable consequence" is meant such consequence as an average man could be reasonably expected to foresee in the circumstances of the case (*Greenland* v. *Chaplin* (1850) 5 Exch., at p. 248, *per* Pollock, C. B.).]

Infringement of public right

725. The infringement of a right of the public gives rise to an action at the suit of an individual when —

(*a*) a private right of the plaintiff has also been infringed by the act or omission complained of, or

(*b*) the plaintiff has suffered a special damage by such act or omission.

Benjamin v. *Storr* (1874) L. R. 9 C. P. 400.
Lyon v. *Fishmongers' Company* (1876) L. R. 1 App. Ca. 662.
Boyce v. *Paddington Council* [1903] 1 Ch. 109; [1906] A. C. 1.

Breach of statutory duty

726. The breach of a statutory duty gives rise to an action at the suit of an individual when —

(*a*) he has suffered a special damage by such breach;[a] and

(*b*) the damage suffered is within the mischief contemplated by the statute;[b] and

(*c*) the statute has not expressly or by implication excluded the remedy by action.[c]

(a) *Atkinson* v. *Newcastle Waterworks* (1877) 2 Ex. D. 441.
(b) *Gorris* v. *Scott* (1874) L. R. 9 Exch. 125; *Ward* v. *Hobbs*, (1878) L. R. 4 App. Ca. 13.
(c) *Groves* v. *Wimborne* [1898] 2 Q. B. 402.
Clegg v. *Earby Gas Co.* [1896] 1 Q. B. 592.
Johnston v. *Consumers Gas Co. of Toronto* [1898] A. C. 447. (P. C.).
Davis v. *Mayor of Bromley* [1907] 1 K. B. 170.

[Sometimes even the remedy of Mandamus is not available (*Pasmore* v. *Oswaldtwistle &c. Council* [1898] A. C. 387). But when the right of action for damages in respect of a breach of statutory duty is excluded, the Court may yet have jurisdiction to grant a remedy by way of Injunction (*Hayward* v. *East London Waterworks Co.* (1884) 28 Ch. D. 138; *Stevens* v. *Chown* [1901] 1 Ch. 894).]

Intention or negligence

727. Subject to the provisions of the law on the subject of liability for the torts of other persons and animals (*post*, Titt. IV & V), an act or omission does not give rise to an action of Tort unless it is either intentional or negligent.

Holmes v. *Mather* (1875) L. R. 10 Exch. 261.
Emmens v. *Pottle* (1885) 16 Q. B. D. 354.
Stanley v. *Powell* [1891] 1 Q. B. 86.

[The fact that the defendant did not know that his act or omission was wrongful, or that he did not intend any harm by it, is no defence; if, in fact, it was either intentional or negligent (*Weaver* v. *Ward* (1616) Hob. 134; *Baseley* v. *Clarkson* (1680) 3 Lev. 37).]

Negligence

728. Negligence, for the purposes of the law of torts, means the absence of such care or skill as it was the duty of the defendant to use [a] towards the plaintiff.[b] In order to succeed in an action founded on negligence, the plaintiff must (subject to § 729) show that the defendant has been guilty of a breach of such duty towards him,[b] and that the damage alleged was the consequence of such breach.[c]

(a) *Vaughan* v. *Taff Vale Ry. Co.* (1860) 5 H. & N., at p. 688, *per* Willes, J.
Tolhausen v. *Davies* (1888) 58 L. J. Q. B. 98.
(b) *Winterbottom* v. *Wright* (1842) 10 M. & W. 109.
Dickson v. *Reuter's Telegraph Co.* (1877) 3 C. P. D. 1.
Le Lièvre v. *Gould* [1893] 1 Q. B. 491.
Cavalier v. *Pope* [1906] A. C. 428.
Malone v. *Laskey* [1907] 2 K. B. 141.
(c) *Adams* v. *Lancs. & Yorks. Ry. Co.* (1869) L. R. 4 C. P. 739.
Smith v. *L. & S. W. Ry. Co.* (1870) L. R. 6 C. P. 14.
The Notting Hill (1884) 9 P. D. 105.
Smith v. *Johnson* [1897] 2 Q. B., at p. 61.

[If the defendant was negligent, the fact that he could not have foreseen the extent of the damage is immaterial (*Smith* v. *L. & S. W. Ry. Co.*, *ubi sup.*).]

Res ipsa loquitur

729. When an object (not being a live animal)[a] is apparently under the control and management of the defendant, and it causes damage to the plaintiff of a kind which, in the ordinary course of things, does not happen if the person having control or management of similar objects exercises proper care, and the defendant is bound to exercise care to prevent it damaging the plaintiff, the damage will be presumed (in the absence of explanation) to have been caused by the defendant's negligence.[b]

(a) *Manzoni* v. *Douglas* (1880) 6 Q. B. D. 145.
Tillett v. *Ward* (1882) 10 Q. B. D. 17.

(b) *Skinner* v. *L. B. & S. C. Ry. Co.* (1850) 5 Exch. 787.
Byrne v. *Boadle* (1863) 2 H. & C. 722.
Scott v. *London Dock Co.* (1865) 3 H. & C., at p. 601.
Briggs v. *Oliver* (1866) 4 H. & C. 403.
Kearney v. *L. B. & S. C. Ry. Co.* (1871) L. R. 6 Q. B. 759.

[In *Wakelin* v. *L. & S. W. Ry. Co.* (1886) L. R. 12 App. Ca. 41, and *Crisp* v. *Thomas* (1890) 63 L. T. 756, the Court apparently thought that the facts did not raise any presumption of want of care. But the latter decision can hardly be supported.]

Court and jury

730. Whether the facts alleged are evidence of negligence is a question for the Court; whether negligence ought to be inferred from such evidence is (subject to § 729) a question of fact for the jury.

Metro. Ry. Co. v. *Jackson* (1877) L. R. 3 App. Ca., at p. 197, *per* Cairns, L. C.

731. The degree of care or skill required of the defendant is, in general, that which a man of ordinary prudence and ability would have manifested in the circumstances. *Standard of diligence*

Readhead v. *M. R. Co.* (1869) L. R. 4 Q. B. 379.
Richardson v. *G. E. Ry. Co.* (1876) 1 C. P. D. 342.

In particular, the following rules are applicable: —

(i) A person who holds himself out as possessed of special skill, must exercise such skill as is usually manifested by persons making similar professions;

Shiells v. *Blackburne* (1789) 1 H. Bl., at p. 161.
Seare v. *Prentice* (1807) 8 East, 348.
Chapman v. *Walton* (1833) 10 Bing., at p. 63.
Wilson v. *Brett* (1843) 11 M. & W. 113.

[It is immaterial whether the action is framed in Contract or in Tort (*Brown* v. *Boorman* (1844) 11 Cl. & F., at p. 44, *per* Campbell, L. C.; *Turner* v. *Stallibras* [1898] 1 Q. B. 56; *Edwards* v. *Mallan* [1908] 1 K. B. 1002).]

(ii) A person who delivers to another goods which he knows are intended to be used for a particular purpose, is bound to take all reasonable care to bring to the notice of that person, and all others who, to his knowledge, are likely to use the goods for that purpose, the existence of any qualities in such goods, known to him, which may render the goods dangerous if used for such purpose;

Blakemore v. *Bristol & Exeter Ry. Co.* (1858) 8 E. & B., at p. 1051.
Farrant v. *Barnes* (1862) 11 C. B. N. S. 553.
George v. *Skivington* (1869) L. R. 5 Ex. 1.
Clarke v. *Army & Navy Stores* [1903] 1 K. B. 155.

[*Quære.* In respect of what persons does the liability extend? (*Blakemore* v. *Bristol & Exeter Ry. Co.*, *ubi sup.*) In *Longmeid* v. *Holliday* (1851) 6 Exch. 761, there was no evidence that the defendant knew of the dangerous character of the goods.]

(iii) An occupier of land, though he does not, as such, guarantee the safety, even of persons who have a right to come on to it, or who have been invited by him to do so,[a] is bound to exercise care to prevent injury happening to them through a defect in his premises.[b] As respects mere licensees, he is bound only to warn them of any latent source of danger known to him.[c] As respects trespassers, he is only bound not to inflict intentional harm on them.[d]

(a) *Griffiths* v. *L. & St. Katharine's Dock Co.* (1884) 13 Q. B. D. 259.
Walker v. *M. R. Co.* (1886) 11 T. L. R. 450.
Thomas v. *Quatermaine* (1887) 18 Q. B. D. 685.
Woodley v. *M. Ry. Co.* (1887) 2 Ex. D. 384. (The negligence which Cockburn, C. J., attributed in this case to the defendants was expressly explained by him to be "moral negligence" only.)

(b) *Parnaby* v. *Lancaster Canal Co.* (1839) 11 A. & E. 223.
Indermaur v. *Dames* (1866) L. R. 1 C. P. 274.
Heaven v. *Pender* (1883) 11 Q. B. D. 503. (The wider principle laid down by Brett, M. R., in this case, at p. 509, cannot be sustained.)
Bede Steamship Co. v. *Wear Commrs.* [1907] 1 K. B. 310.

(c) *Southcote* v. *Stanley* (1856) 25 L. J. Exch. 339.
Corby v. *Hill* (1858) 4 C. B. N. S. 221.
Bolch v. *Smith* (1862) 7 H. & N. 736.
Gautret v. *Egerton* (1867) L. R. 2 C. P. 371.

(d) *Bird* v. *Holbrook* (1828) 4 Bing. 628.
Hounsell v. *Smyth* (1860) 7 C. B. N. S. 731.
Batchelor v. *Fortescue* (1883) 11 Q. B. D. 474.

[The liability extends to a person who invites others to use or enter upon a ship, staging, or machinery (*Smith* v. *L. & St. Katharine's Dock Co.* (1868) L. R. 3 C. P. 326 (gangway); *Francis* v. *Cockerell* (1870) L. R. 5 Q. B. 501 (race-stand); *Marney* v. *Scott* [1899] 1 Q. B. 986 (ship)).]

(iv) A person who keeps or uses a thing which, unless managed with special care, is likely to cause injury to persons coming into contact with it, is bound to use such care as is necessary to prevent such injury.

Dixon v. *Bell* (1816) 5 M. & S. 198.
Parry v. *Smith* (1879) 4 C. P. D. 325.
Williams v. *Eady* (1893) X T. L. R. 41.

Contributory negligence

732. In an action of Tort founded on the negligence of the defendant, the plaintiff will fail (notwithstanding proof of negligence on the defendant's part) if the decisive cause of the damage suffered by the plaintiff was the plaintiff's own negligence, or (where the plaintiff is a child of tender years) the negligence of the person in charge of him.

(a) *Tuff* v. *Warman* (1858) 5 C. B. N. S. 573.
Radley v. *L. & N. W. Ry. Co.* (1876) L. R. 1 App. Ca. 754.
The Bernina (1887) L. R. 12 P. D., at p. 89 (where see valuable remarks of Lindley, L. J.).

(b) *Waite* v. *N. E. Ry. Co.* (1858) E. B. & E. 719. (This decision was based on the doctrine of "identification," now exploded. See *The Bernina, ubi sup.*, and L. R. 13 App. Ca., at p. 16 (n), where Lord Bramwell expressed the opinion that Waite's case was wrongly decided. But, *semble*, Waite's case can be justified on the ground that the defendant's negligence was not the decisive cause of the damage.)

But: —

(i) where the conduct of the plaintiff, though the proximate cause of the damage, amounts to a reasonable choice of difficulties created by the defendant's negligence, the plaintiff is not guilty of contributory negligence;

Clayards v. *Dethick* (1848) 12 Q. B. 439.
Rose v. *N. E. Ry. Co.* (1876) 2 Ex. D. 248.

(ii) where the plaintiff is a child of tender years, the amount of care expected from him will not be that which would be expected of an adult in similar circumstances, but only that which he is capable of exercising;

Lynch v. *Nurdin* (1841) 1 Q. B. 29.
Williams v. *G. W. R. Co.* (1874) L. R. 9 Exch. 157.

[But see *Singleton* v. *Eastern Counties Ry. Co.* (1859) 7 C. B. N. S. 287; *Hughes* v. *Macfie* (1863) 2 H. & C. 744; and *Mangan* v. *Atterton* (1866) L. R. 1 Ex. 239.]

(iii) where the defendant's negligence amounts to an inducement to the child to commit the act which causes damage to him, the fact that the child was a trespasser, or guilty of contributory negligence, is no defence.

Harrold v. *Watney* [1898] 2 Q. B. 320.

[There is an important exception to the rule stated in this § in the case of damage to ship or cargo caused by collision at sea, where both parties are to blame. In such a case, the old Admiralty rule now prevails in all Courts; and the total loss of both parties is equally divided between them. (Judicature Act, 1873, s. 25 (9); *The Englishman and The Australia* [1894] P. 239). But the Admiralty rule does not apply to actions for loss of life (*The Bernina* (2) (1887) 12 P. D. 58).]

Act of third party

733. Where the damage to the plaintiff is caused by the negligence of the defendant in conjunction with the act of a stranger, the defendant is liable if his negligence was the effective cause of the damage.

Clark v. *Chambers* (1878) 3 Q. B. D. 327.
Englehart v. *Farrante* [1897] 1 K. B. 240.
McDowall v. *G. W. R.* [1903] 2 K. B. 331.

734. An act which is *prima facie* evidence of negligence on the part of the defendant may (*semble*) be justified by proof that it was done in obedience to a more pressing duty. *Justifiable negligence*

Angus v. *London Tilbury & Southend Co.* (1906) XXII T. L. R. 222.

[NOTE. The negligence of trustees and executors, as such, will be more conveniently dealt with at later stages of the work. Such negligence does not give rise to an action of Tort.]

735. Except where malice is an essential element of specific torts, an act or omission does not amount to a tort by reason merely of the fact that it is induced by a malicious or improper motive; even though pecuniary damage is caused. *Malice*

Mayor of Bradford v. *Pickles* [1895] A. C. 587.
Allen v. *Flood* [1898] A. C. 1.

[It is difficult to frame a definition of "malice" which will cover all the cases; but reference may be made to the *dicta* of Bayley, J., in *Bromage* v. *Prosser* (1825) 4 B. & C., at p. 255, and of Parke, B., in *Mitchell* v. *Jenkins* (1833) 5 B. & Ad., at p. 595. Generally speaking, proof of malice rebuts a *primâ facie* defence or presumption that an act causing damage was done in discharge of a legal or moral duty, or in the exercise or protection of a common or individual right or interest. Thus, in malicious prosecution, proof of malice rebuts the presumption that the defendant in prosecuting was merely exercising his rights as a citizen. (See *Allen* v. *Flood*, *ubi sup.*, opinion of Wright, J., at p. 66.) In defamation, malice need be proved only to rebut the defence of privilege (and, *semble*, to disprove the plea of fair comment). In slander of title, malice rebuts the presumption that the defendant acted in exercise of a claim of right. (See per Bowen, L. J., in *Skinner* v. *Shew* [1893] 1 Ch., at p. 423.) In cases of interference with contractual rights, malice rebuts the presumption that the defendant acted in ignorance of the right infringed, and with just cause or excuse. Proof of malice is sometimes material also in aggravation of damages. (See below, Tit. VII, § 798 (ii).)]

Choice of remedies

736. The same act or omission may be both a breach of contract and a tort;[a] and in such cases the person injured, if a party to the contract, may (subject to § 761) sue either in Contract or in Tort. But no stranger to the contract can sue otherwise than in Tort.[b]

(a) *Coggs* v. *Bernard* (1704) 2 Ld. Raymond, 909.
Bradshaw v. *L. & Y. Railway Co.* (1875) L. R. 10 C. P. 189.
Winterbottom v. *Wright* (1842) 10 M. & W. 109.
Dickson v. *Reuter's Telegraph Co.* (1877) 3 C. P. D. 1.
Turner v. *Stallibrass* [1898] 1 Q. B. 56.
(b) *Meux* v. *G. E. Ry. Co.* [1895] 2 Q. B. 387.
Earl v. *Lubbock* [1905] 1 K. B. 253.

[*Semble*, where the plaintiff is entitled to sue both in Contract and in Tort, he cannot increase the defendant's liability by suing in Tort (*Chinery* v. *Viall* (1860) 5 H. & N. 288).]

Co-tort-feasors

737. Where two or more persons have been concerned in the commission of a tort, each is liable for the whole of the loss suffered by the plaintiff;[a] but if judgment is obtained against one, or if the person injured releases one of them, the action against the other or others is barred.[b]

(a) *Clark* v. *Newsom* (1847) 1 Exch. 140.
(b) *Brinsmead* v. *Harrison* (1871) L. R. 6 C. P. 584; 7 C. P. 547.
Duck v. *Mayeu* [1892] 2 Q. B. 511.

[But a covenant not to sue is not a release (*Duck* v. *Mayeu ubi sup.*).]

Contribution

738. One of two or more joint tort-feasors, who has been compelled to pay damages in respect of the

tort, has not, merely from that fact, any right to an indemnity or contribution from the other or others.[a] But where there is in fact an express or implied agreement for indemnity or contribution, he will be entitled to enforce such agreement; unless he was, at the time of committing the tort, aware of the existence of facts rendering the act or omission complained of unlawful.[b] (Book II, Part II, § 535.)

(a) *Merryweather* v. *Nixan* (1799) 8 T. R. 186.
(b) *Adamson* v. *Jarvis* (1827) 4 Bing. 66.
The Englishman and The Australia [1895] P. 212.
Sheffield Corporation v. *Barclay* [1905] A. C. 392.

[For an apparent exception to the first part of the rule, see *ante*, § 721.]

Who are joint-feasors

739. Persons are joint tort-feasors when one aids, counsels, or joins the other in the commission of a tort.

Petrie v. *Lamont* (1842) C. & M., at p. 96, *per* Tindal, C. J.

Independent tort-feasors

740. Persons whose acts, committed without a common design, together amount to a tort, can only be sued separately for damages;[a] but (possibly) an injunction against the continuance or repetition of the acts may be obtained in an action brought against them as co-defendants.[b]

(a) *Sadler* v. *G. W. R. Co.* [1896] A. C. 450.
Thorpe v. *Brumfitt* (1873) L. R. 8 Ch. App. 650;
(b) *Lambton* v. *Mellish* [1894] 3 Ch. 163.
Sadler v. *G. W. R. Co.*, *ubi sup.*

Tort and felony

741. A felonious act may give rise to an action of Tort; but (*semble*) the policy of the law does not permit the party injured by such felonious act to seek civil redress, if he has failed in his duty of bringing, or endeavouring to bring, the felon to justice.

Ex parte Ball (1879) 10 Ch. D., at p. 674, *per* Baggallay, L. J.

[The rule only applies as between the felon and the party injured (*White* v. *Spettigue* (1845) 13 M. & W. 603; *Appleby* v. *Franklin* (1885) 17 Q. B. D. 93). There is also great doubt as to the mode in which it can be enforced. (See cases cited *supra*, and *Roope* v. *D'Avigdor* (1883) 10 Q. B. D. 412.)]

TITLE II — EXEMPTIONS FROM LIABILITY FOR TORTS

Foreign torts

742. No action can be maintained in England for a tort bringing in issue the title or possession of land situate out of England, or for a trespass or other tort to land so situate;[a] but an action will lie for a tort affecting person or movables committed out of England,[b] provided that: —

(i) the wrong would have been actionable if committed in England;[c] and

(ii) the wrong was not, at the time of its commission, nor has subsequently become, justifiable by the law of the place where it was committed.[d]

(a) *Companhia de Moçambique* v. *British South Africa Co.* [1892] 2 Q. B. 358, at p. 366; [1893] A. C. 602.

(b) *The M. Moxham* (1876) L. R. 1 P. D. 107; *Carr* v. *Fracis Times & Co.* [1902] A. C. 176.

(c) *The Halley* (1868) L. R. 2 P. C. 193.

(d) *Phillips* v. *Eyre* (1870) L. R. 6 Q. B. 1; *Machado* v. *Fontes* [1897] 2 Q. B. 231.

[Courts of Equity sometimes entertain actions concerning contracts or equities affecting lands situated abroad, when the parties can be made amenable to their jurisdiction. (*Penn* v. *Lord Baltimore* (1750) 1 Ves. Sen. 445; *Duder* v. *Amsterdamsch Trustees Kantoor* [1902] 2 Ch. 132. And see *Norris* v. *Chambers* (1861) 3 D. F. & J. 584.) But the principle is difficult to define.]

Torts of Crown

743. No proceedings can be taken against the Crown for a tort.

Tobin v. *Reg.* (1864) 16 C. B. N. S. 310.

Official liability

744. Public officials, being servants of the Crown, cannot be sued in their representative capacity for torts committed by them or by their subordinates.

Raleigh v. *Goschen* [1898] 1 Ch. 73.
Bainbridge v. *Postmaster General* [1906] 1 K. B. 178.

Personal liability of officials

745. Public officials may be sued in their private capacity for torts committed by them on behalf of or with the authority of the Crown; and the order of the Crown is no defence to such action.(a) But they are not personally liable for the torts of their subordinates, unless expressly authorized or ratified by them.(b)

(a) *Entick* v. *Carrington* (1765) 19 St. Tri. 1030. (See also *Raleigh* v. *Goschen*, and *Bainbridge* v. *P. M. G.*, *ubi sup.*)

(b) The subordinates of a Crown official are not his servants; and therefore he is not responsible for their acts as an employer would be (*Mersey Docks* v. *Gibbs* (1866) L. R. 1 H. L., at p. 124).

"Act of State"

746. No action of Tort can be maintained in an English Court by any foreign State, or by any alien, in respect of an act affecting such State or alien; if such act has been authorized or ratified by the British Crown.

Buron v. *Denman* (1848) 2 Exch. 167.

[*Quære.* Does this rule apply to acts of the Crown done to an alien resident in England? *Quære* also. Is there a converse rule which would prevent an action being brought in an English Court

against a defendant who justifies under the authority of a foreign government? (See *Dobree* v. *Napier* (1836) 2 Bing. N. C. 202.)]

Colonial Governor

747. An action of Tort can be brought against a Colonial Governor, either in the colonial or an English Court; but the defendant may plead as a defence that the act complained of was within the scope of his lawful authority. Each Court has jurisdiction to determine whether this plea is justified.

Mostyn v. *Fabrigas* (1774) 1 Cowp. 161.
Musgrave v. *Pulido* (1879) L. R. 5 App. Ca. 102 (P. C.).
Walker v. *Baird* [1892] A. C. 491 (P. C.).

[The principle in §§ 744–747 is: that no action can be brought against the Crown or its servants or agents as representing it; but that every man, whether a servant of the Crown or not, and whether acting under the orders of the Crown or not, is (subject to § 746) personally liable at common law for every tort committed by him or by his orders. The Irish Courts have, however, held that the Lord Lieutenant is not liable to be sued in them during his term of office, in respect of any political act. (*Luby* v. *Wodehouse* (1865) 17 Ir. C. L. R. 618. And see *Musgrave* v. *Pulido*, *ubi sup.*, at pp. 111–112.)]

Foreign rulers and diplomats

748. No action of Tort can be brought against the ruler,[a] or an ambassador or duly accredited public Minister, of a foreign State,[b] or against any member of the suite of such ambassador or Minister;[c] unless such person submits himself to the jurisdiction.

(a) *The Parlement Belge* (1880) 5 P. D. 197.
Mighell v. *Sultan of Johore* [1894] 1 Q. B. 149.
(b) Diplomatic Privileges Act, 1708, s. 3.
Musurus Bey v. *Gadban* [1894] 1 Q. B. 533; 2 Q. B. 352.
(c) *Parkinson* v. *Potter* (1885) 16 Q. B. D. 152.

Judicial acts

749. Subject to § 750, no action of Tort will lie against a judge for any act done by him in his judicial capacity; even though such act was done maliciously.

Anderson v. *Gorrie* [1895] 1 Q. B. 668.
Bottomley v. *Brougham* [1908] 1 K. B. 584.

[This doctrine applies, not only to the superior Courts, but to the Court of a Coroner and to a Court Martial, which are not Courts of Record. (See *per* Kelly, C. B., in *Scott* v. *Stansfield* (1868) L. R. 3 Ex. 220; *Dawkins* v. *Lord Rokeby* (1873) L. R. 8 Q. B., at p. 263.) A magistrate, while sitting in the course of his judicial duties, has in this respect the privilege of a judge; at least so far as defamation is concerned (*Law* v. *Llewellyn* [1906] 1 K. B. 487). For his liability in general, see Justices Protection Act, 1848, s. 1.]

Excess of jurisdiction

750. A judge with inferior or limited jurisdiction will be liable to an action for a tort committed in excess of his jurisdiction; provided he knew, or ought to have known, that he had no jurisdiction in the matter.

Calder v. *Halket* (1839) 3 Moo. P. C. 28.
Houlden v. *Smith* (1850) 14 Q. B. 841.

[*Quære:* whether this rule does not also apply to a judge of a superior Court. (See *Anderson* v. *Gorrie*, *supra*, at p. 671, *per* Lord Esher, M. R.)]

Forensic privilege

751. No action of libel or slander will lie against counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law.

Dawkins v. *Lord Rokeby*, *ubi sup.*
Lilley v. *Roney* (1892) 61 L. J. Q. B. 727.
Bottomley v. *Brougham*, *ubi sup.*

Ministerial officials of courts

752. A ministerial officer is not liable to an action for executing the order of a Court or of a magistrate acting judicially; if the order executed is on the face of it both regular and within the jurisdiction of the Court or magistrate issuing it.[a] But he will be liable if it appears on the face of the order that the Court or the magistrate had no jurisdiction, or if he exceeds his authority, or carries out the order improperly.[b]

(a) *Case of the Marshalsea* (1613) 10 Co. Rep. 68 b.
Tarlton v. *Fisher* (1781) 2 Dougl. 671.
Andrews v. *Marris* (1841) 1 Q. B. 3.
Carratt v. *Morley* (1841) 1 Q. B. 18.
Morrell v. *Martin* (1841) 3 M. & G. 581. (And compare *Savacool* v. *Boughton* (1830) 5 Wend. (New York) 170.)

(b) *Coote* v. *Lighworth* (1596) F. Moore, 457.
Six Carpenters' Case (1608) 8 Co. Rep. 146 a.
Jelks v. *Hayward* [1905] 2 K. B. 460.
And see *Andrews* v. *Marris, supra.*

Constables' privileges

753. A constable is also protected in respect of anything done in obedience to a warrant under the hand or seal of a Justice of the Peace, notwithstanding any defect of jurisdiction in such Justice, if such constable produces the warrant, and furnishes a copy within six days from the demand by or on behalf of the complainant.

Constables Protection Act, 1750, s. 6.
Clark v. *Woods* (1848) 2 Exch. 395.

Boards of Guardians

754. No action will lie against a Board of Guardians by a pauper who has been set to work by such

Guardians in the due discharge of their statutory ministerial duties, and has suffered injury in the course of such work by reason of the negligence of their officer.

Tozeland v. *Guardians of West Ham* [1907] 1 K. B. 920.

[*Quære.* How far will the principle of this decision apply to other public bodies?]

Trade disputes

755. No action will lie against a Trade Union, whether of workmen or masters, or against any members or officials thereof, on behalf of themselves and all other members of the Trade Union, in respect of any tortious act alleged to have been committed by or on behalf of the Trade Union.

Trade Disputes Act, 1906, s. 4.

[Does this mean that the member or official cannot be sued in his individual capacity (*Bussy* v. *Amalgamated Society of Railway Servants and Bell* (1908) XXIV T. L. R. 437).]

Defence of statutory authority

756. Where an act, *primâ facie* tortious, is sought to be justified on the ground that it was committed under statutory powers, it is a question of construction in each case whether the powers were intended by the legislature to be absolute (in which case the act is justified [a]) or merely qualified (in which case they are only exercisable subject to the rules of the general law).[b]

(a) *Vaughan* v. *Taff Vale Ry.* (1860) 5 H. & N. 679.
Hammersmith Ry. Co. v. *Brand* (1869) L. R. 4 H. L. 171.
London, Brighton & S. C. Ry. v. *Truman* (1885) L. R. 11 App. Ca. 45.

[But see *Canadian Pacific Ry. Co.* v. *Parke* [1899] A. C. 549 (P. C.).]

(b) *Jones* v. *Festiniog Ry. Co.* (1868) L. R. 3 Q. B. 733.
Powell v. *Fall* (1880) 5 Q. B. D. 597.
Metropolitan Asylum Board v. *Hill* (1881) L. R. 6 App. Ca. 193.
Rapier v. *London Tramways Co.* [1893] 2 Ch. 588.
Midwood v. *Manchester Corp.* [1905] 2 K. B. 597.
Fletcher v. *Birkenhead Corp.* [1907] 1 K. B. 205.

[These are all cases of nuisance; but it seems clear that the principle would apply to torts generally.]

Actions against public authorities

757. Actions brought in respect of any act done in pursuance, or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of an alleged neglect or default in the execution of any such Act, duty, or authority, are subject to the rule of limitation specified in § 159 (*f*) (*ante*, Book I) and to certain rules in respect of costs.

Public Authorities Protection Act, 1893, s. 1.

[As to the kind of actions which fall within this statute, see the judgment of Vaughan Williams, L. J., in *Lyles* v. *Southend-on-Sea* [1905] 2 K. B. 1.]

TITLE III—CAPACITY IN RESPECT OF TORTS

Liability of corporations

758. A corporation is liable for a tort committed by its officers or servants in the course of their employment; even though a particular mental state is of the gist of the tort complained of.

Barwick v. *English Joint Stock Bank* (1867) L. R. 2 Exch. 259.

[It was once thought that a corporation could not be made liable for a tort to which proof of a particular mental state (*e. g.* malice) was material; and this view was forcibly expressed by Lord Bramwell in *Abrath* v. *N. E. Ry.* (1886) L. R. 11 App. Ca., at p. 250. But it has now been abandoned. (See *Cornford* v. *Carlton Bank* [1900] 1 Q. B. 22; *Citizens' Life Assurance Co.* v. *Brown* [1904] A. C. 423 (P. C.).)]

Actions by corporations

759. A corporation can bring an action for a tort affecting its business or property;[a] but not for a tort which, though apparently directed against the corporation, in fact only affects the personal reputation of its members.[b]

(a) *South Hetton Coal Co.* v. *North Eastern News Co.* [1894] 1 Q. B. 133.

(b) *Mayor of Manchester* v. *Williams* [1891] 1 Q. B. 94.

[It is pointed out by Lord Esher, M. R., in the case first cited, that the law is the same for corporations and individuals, but that the application is different. This results from the fact that a corporation is not a human being; and so can not, *e. g.*, suffer an assault.]

Infants and lunatics

760. A minor[a] (and probably a lunatic[b]) is liable for a tort; but where proof of a particular state of mind in the defendant is essential to liability, the mental capacity of the defendant will be relevant to the determination of the existence of such state of mind.[c]

(a) *Stikeman* v. *Dawson* (1847) 1 D. & S. 108.
Burnard v. *Haggis* (1863) 14 C. B. N. S. 45.
(b) *Weaver* v. *Ward* (1616) Hob. 134.
Mordaunt v. *Mordaunt* (1870) L. R. 2 P. & M., at p. 142.
Hanbury v. *Hanbury* (1892) VIII. T. L. R., at p. 560. (See Book I, § 64.)
(c) *Weaver* v. *Ward, ubi sup.*
Emmens v. *Pottle* (1885) 16 Q. B. D., at p. 356.

[A claim really arising out of a contract cannot be converted into a claim in Tort for the purpose of making a minor liable (*Jennings* v. *Rundall* (1799) 8 T. R. 335). See Book I, § 61.]

Infants' liability

761. Where a minor commits a tort which is indirectly connected with, but independent of, a contract,[a] or where a minor wrongfully detains goods obtained under a contract which he has repudiated, or which has determined,[b] the plea of infancy is no defence to an action founded on Tort.

(a) *Burnard* v. *Haggis* (1863) 14 C. B. N. S. 45.
(b) *Mills* v. *Graham* (1804) 1 B. & P. N. R. 140.
The Queen v. *McDonald* (1885) 15 Q. B. D., at pp. 325 & 328, per Cave, J.

Fraud of infant

762. A minor cannot be made liable in Tort for fraudulent representation, whereby he has induced

the plaintiff to enter into a contract with him.[a] But he is liable in equity to restore, so far as may then be possible, the property which he has obtained by a false representation as to his age, or (*semble*) by means of any other fraud.[b]

(a) *Johnson* v. *Pye* (1666) 1 Sid. 258 (quoted at length in *Stikeman* v. *Dawson*, *supra*).
Wright v. *Leonard* (1861) 10 C. B. N. S. 258.
(b) *Ex parte Unity Bank* (1858) 3 De G. & J. 63.
Lemprière v. *Lange* (1879) 12 Ch. D. 675.
Ex parte Jones (1881) 18 Ch. D., at p. 120.

Torts of married women

763. A married woman may sue or be sued in respect of torts committed against or by her before or during the marriage, as if she were a *feme sole;* and her husband need not be joined. But damages recovered against her in such an action are payable only out of her separate property not restrained from anticipation.

Married Woman's Property Act, 1882, s. 1 (2), 13, 19.

[Before the Act the separate estate of a married woman was not liable in equity for her general torts (*Wainford* v. *Heyl* (1875) L. R. 20 Eq. 321). But at common law a married woman could be sued for her torts; though, if her husband was not joined, she could plead her coverture in abatement. If sued jointly with her husband, judgment went against both; and she could be taken in personal execution. If it then appeared that she had no separate estate, the Court would discharge her as a matter of indulgence (*Scott* v. *Morley* (1887) 20 Q. B. D. 120).]

Torts between husband and wife

764. Husband and wife cannot sue one another in tort; except that a wife may bring an action against

her husband for the protection and security of her separate property.

Married Woman's Property Act, 1882, s. 12.

[It appears that the same rule prevails between divorced persons, in respect of torts committed during the marriage. (See *Phillips* v. *Barnet* (1876) 1 Q. B. D. 436.)]

Actions by co-owners

765. One co-owner may sue a stranger in tort in respect of the common property, without joining his co-owners as plaintiffs.[a] But the Court may, in the exercise of its discretion, stay the action, until the plaintiff's co-owners are added as defendants.[b]

(a) *Sheehan* v. *G. E. Ry. Co.* (1880) 16 Ch. D. 59.
Lauri v. *Renad* [1892] 3 Ch., at p. 413.
Roberts v. *Holland* [1893] 1 Q. B. 665.
(b) R. S. C. 1883. O. XVI. r. 11.

[There is an exception from the rule in the case of Detinue; at any rate where the defendant is in the position of a stake-holder, or other lawful position (*Wright* v. *Robotham* (1886) 33 Ch. D. 106). And, though the subject is obscure, it would seem that, under the old law, if one *joint* owner sued a stranger in respect of the joint property, the defendant could plead the joint ownership in abatement; though, if he did not do so, and judgment was recovered against him, it was then too late to raise the point. (See notes to *Coryton* v. *Lithebye* (1670) 2 Wms. Saund. (edn. 1845), at p. 117.) Possibly the rule as to abatement applied also to owners in common (*Addison* v. *Overend* (1769) 6 T. R. 766). In actions of Trover (*post*, Sect. III, Tit. II) evidence of co-ownership could not even be given in evidence on the general issue (*Nelthorpe* v. *Farrington* (1674) 2 Lev. 113; *Brown* v. *Hedges* (1708) 1 Salk. 290). And, apparently, a mere wrong-doer could not, even in an action of Detinue, plead non-joinder of co-owners (*Broadbent* v. *Ledward* (1839) 11 A. & E. 209). On the other hand, a part-owner can only recover to the extent of his interest (*Addison* v. *Overend*, *ubi sup.*; *Dent* v. *Turpin* (1861) 2 J. & H. 139).]

TITLE IV—LIABILITY FOR THE TORTS OF OTHERS

Torts of agents

766. Every person (including a corporation) is liable for a tort committed by another which such person has authorised or ratified.

Wilson v. *Tumman* (1843) 6 M. & G. 236.
Hilbery v. *Hatton* (1864) 2 H. & C. 822.

[There is a statutory exception from this rule which prevents a person (including a corporation and the partners in a firm) being sued on any representation made as to the credit of another person, unless he has actually signed such representation (Statute of Frauds (Amendment) Act, 1828, s. 6; *Williams* v. *Mason* (1873) 28 L. T. 232; *Swift* v. *Jewsbury* (1874) L. R. 9 Q. B. 301; *Hirst* v. *West Riding Banking Co.* [1901] 2 K. B. 560).]

Torts of servants

767. A master is liable for the torts of his servant, committed in the course of his employment, to the extent specified in § 138 (*ante*, Book I); even though the tort in question is in excess of the servant's duty, or is an improper mode of performing an act authorised by the master.

Bayley v. *Manchester Ry. Co.* (1873) L. R. 8 C. P. 148.
Hamlyn v. *Houston* [1903] 1 K. B., at p. 85.

Forbidden acts

768. The fact that the conduct of the servant, which occasioned or constituted the tort, was expressly forbidden by the master,[a] or that it amounts

to a criminal offence,[b] is no defence to an action of Tort against the master.

(a) *Limpus* v. *London General Omnibus Co.* (1862) 1 H. & C. 526.
(b) *Dyer* v. *Munday* [1895] 1 Q. B. 742.
Baker v. *Snell* [1908] W. N. 122.

Who is a "master"

769. For the purpose of ascertaining liability in Tort, where one person reserves the control and direction of the mode in which work is to be done by another, he is said to be the master and the other the servant.

Laugher v. *Pointer* (1826) 5 B. & C. 547.
Quarman v. *Burnett* (1840) 6 M. & W. 499.
Martin v. *Temperley* (1843) 4 Q. B. 298.
Jones v. *Scullard* [1898] 2 Q. B. 565.
Waldock v. *Winfield* [1901] 2 K. B. 596.
Dewar v. *Tasker and Sons* (1907) XXIII T. L. R. 259.

Evidence of control

770. The question whether the defendant does or does not reserve such control and direction, is a question for the jury.[a] But the fact that he has (*a*) the right of selection,[b] or (*b*) the duty of paying,[c] or (*c*) the power of dismissing,[d] the person actually committing the tort, is *primâ facie* evidence of the relationship of master and servant. This presumption is strengthened by the fact that such person is using the property of the defendant.[e]

(a) *Brady* v. *Giles* (1835) 1 Moo. & Rob. 494.
(b) *Quarman* v. *Burnett* (1840) 6 M. & W. 499.
(c) *Jones* v. *Corporation of Liverpool* (1885) 14 Q. B. D. 890. (But not conclusive evidence (*Donovan* v. *Laing* [1893] 1 Q. B. 629).)
(d) *Dewar* v. *Tasker and Sons* (1907) XXIII T. L. R. 259. (But not conclusive evidence (*Reedie* v. *L. & N. W. R. Co.* (1849) 4 Exch. 244).)
(e) *Jones* v. *Scullard* [1898] 2 Q. B. 565.
Perkins v. *Stead* (1907) XXIII T. L. R. 433.

Special relationship

771. A person may be the general servant of one master, and yet the servant of another for the purposes of a particular matter.

Rourke v. *White Moss Colliery Co.* (1877) 2 C. P. D. 205.
Donovan v. *Laing* [1893] 1 Q. B. 629.

[In these cases the person who is master at the time of the commission of the tort is alone liable. "The law does not recognize a several liability in two principals who are unconnected" (Littledale, J., in *Laugher* v. *Pointer*, *ubi sup.*, at p. 558).]

"Course of employment"

772. In considering the question whether the conduct of the servant is within the course of his employment, the following rules are material: —

(*a*) A master will not be responsible for the unlawful act of his servant committed under the *bonâ fide* but mistaken belief that the master had power to authorise such act, if in fact the master has not authorised it;

Poulton v. *L. & S. W. Ry. Co.* (1867) L. R. 2 Q. B. 534.

[Does not this decision rest on a misapprehension of the doctrine of *ultra vires?* Has it ever been held to apply where the defendant was an individual?]

(*b*) Where a discretion is given to a servant, the master will be liable if such discretion is wrongly exercised;

Goff v. *Great Northern Ry. Co.* (1861) 3 E. & E. 672.
Moore v. *Metropolitan Ry. Co.* (1872) L. R. 8 Q. B. 36.

(*c*) It is within the course of a servant's employment to do any act necessary for the protection of his

master's property. But the master will not on this ground be held responsible for a wrongful arrest or other tort committed when the property was no longer in danger;

Allen v. *L. S. W. Ry.* (1870) L. R. 6 Q. B. 65.
Bank of New South Wales v. *Owston* (1879) L. R. 4 App. Ca. 270 (P. C.).
Abrahams v. *Deakin* [1891] 1 Q. B. 516.
Hanson v. *Waller* [1901] 1 Q. B. 390.

(*d*) A tort committed by a servant for his own ends, and not on behalf of his master, will not be deemed to be within the course of his employment;

McManus v. *Crickett* (1800) 1 East, 106.
Rayner v. *Mitchell* (1877) L. R. 2 C. P. D. 357.
Ruben v. *Great Fingall Consolidated* [1906] A. C. 439.

(*e*) Where the tort of a servant is such as to break the connection of master and servant, it will not be deemed to be within the course of his employment.

Sanderson v. *Collins* [1904] 1 K. B., at p. 632.
Cheshire v. *Bailey* [1905] 1 K. B. 237.

[Is this case anything more than an extreme example of (*d*)?]

Subject to the above rules, the question whether the servant's conduct was within the course of his employment is a question of fact for the jury.

Bank of N. S. W. v. *Owston* (1879) L R. 4 App. Ca. 270.

Independent contractor

773. An employer is not generally liable for the imperfect or improper performance of work by an independent contractor.

Milligan v. *Wedge* (1840) 12 A. & E. 737.
Repson v. *Cubitt* (1842) 9 M. & W. 710.

But this rule is subject to the following exceptions, viz.: —

(*a*) Where the work commissioned is unlawful, the employer will be liable;

Ellis v. *Sheffield Gas Co.* (1853) 2 E. & B. 757.

(*b*) Where the employer himself takes part in, or interferes with, the performance of the work, he will be liable;

McLaughlin v. *Pryor* (1842) 2 M. & G. 48.
Holliday v. *National Telephone Co.* [1899] 2 Q. B. 392.

(*c*) Where there is an absolute duty imposed by statute[a] or by the common law[b] upon the employer, he cannot discharge himself from responsibility by employing an independent contractor;

(a) *Hole* v. *Sittingbourne Ry.* (1861) 6 H. & N. 488.
(b) *Bower* v. *Peate* (1876) 1 Q. B. D. 321.
Dalton v. *Angus* (1881) L. R. 6 App. Ca., at p. 829.

(*d*) Where there is a duty upon the employer to see that reasonable skill and care are exercised in the performance of the particular work, he will be liable if such skill and care are not

exercised.[a] Such a duty is cast upon an employer, who, being the occupier of land or a building, or the supplier of any carriage, ship, machinery, or other artificial structure, invites persons to enter on or use the same for his own purposes,[b] or who authorises work which is likely, if badly done, to cause danger to his neighbours,[c] or to any of the public lawfully passing along the highway.[d]

(a) *Pickard* v. *Smith* (1861) 10 C. B. N. S. 470.
Hardaker v. *Idle District Board* [1896] 1 Q. B. 335.
(b) *Francis* v. *Cockrell* (1870) L. R. 5 Q. B. 501.
Marney v. *Scott* [1899] 1 Q. B. 986.
Coughlin v. *Gillison* [1899] 1 Q. B. 45 (where the machinery in question was not used at the invitation of the defendants or in their interests).
(c) *Percival* v. *Hughes* (1883) L. R. 8 App. Ca. 443.
(d) *Tarry* v. *Ashton* (1876) 1 Q. B. D. 314.
Penny v. *Wimbledon Urban Council* [1899] 2 Q. B. 73.
Holliday v. *National Telephone Co. ibid.* 392.
The Snark [1900] P. 105.

[In such cases both the employer and the independent contractor are liable for the wrongful act of the contractor or his servant.

Whiteley v. *Pepper* (1877) 2 Q. B. D. 276.
Lemaitre v. *Davis* (1881) 19 Ch. D. 281.]

Collateral acts of contractor

774. If an independent contractor is employed to do a lawful act, his employer is not liable for negligence on the part of the contractor or his servants, which is casual and merely collateral to the performance of the act.

Pickard v. *Smith* (1861) 10 C. B. N. S. 470.
Dalton v. *Angus* (1881) L. R. 6 App. Ca., at p. 829, *per* Lord Blackburn.
Hardaker v. *Idle District Board* [1896] 1 Q. B., at p. 340.
Penny v. *Wimbledon Urban Council* [1899] 2 Q. B., at p. 76.

Husband's liability

775. A husband is liable for torts committed by his wife before marriage and during marriage; to the extent specified in Book I, §§ 136 and 137 respectively.

[See also *Head* v. *Briscoe* (1833) 5 C. & P. 484; *Capel* v. *Powell* (1864) 17 C. B. N. S. 743, as to the effect of separation and divorce. In the case of ante-nuptial torts, the husband may be sued alone; as his liability is statutory (*Beck* v. *Pierce* (1889) 23 Q. B. D., at p. 321).]

Partners

776. Where by any wrongful act or omission of any partner, acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner, the firm is liable therefor, to the same extent as such partner.

Partnership Act, 1890, s. 10.

[For the statutory exception from this rule, see § 766, note. *Semble*, this exception has not been abolished by the Partnership Act, 1890.]

Liability of partnership for misapplication by partner

777. Where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it, and where a firm in the course of its business receives the money or property of a third person, and the money or property so received is misapplied by one or more of the

partners while it is in the custody of the firm, the firm is liable to make good the loss.

Partnership Act, 1890, s. 11.
Tendring Hundred Waterworks v. *Jones* [1903] 2 Ch. 615.

[Every partner is liable jointly with his co-partners, and also severally, for everything for which the firm while he is a partner therein becomes liable under §§ 776 and 777 (Partnership Act, 1890, s. 12).]

TITLE V — LIABILITY FOR THE ACTS OF ANIMALS

Domestic animals

778. Subject to §§ 779 and 782, a person who keeps a domesticated animal is liable for any damage committed by it as the result of its trespassing upon the land of another; provided such damage is of the kind usual for such animal to commit.

Y. B. 20 Edw. IV (1481) fo. 11. pl. 10, quoted by Lord Blackburn in *Fletcher* v. *Rylands* (1866) L. R. 1 Exch. 280 (cattle).
Dewell v. *Sanders* (1618) Cro. Jac. 490 (doves).
Ellis v. *Loftus Iron Co.* (1874) L. R. 10 C. P. 10 (horses).
Brady v. *Warren* [1900] 2 Ir. Rep. (Q. B. D.) 632 (tame deer).
O'Gorman v. *O'Gorman* [1903] 2 Ir. Rep. (K. B. D.) 573 (bees).

[It seems doubtful whether the liability extends to any damage other than that caused by trespass to land. (See the stress laid on this point by the Court in *Ellis* v. *Loftus Iron Co.*, *ubi. sup.*; and see Chitty, *Pleading* (6th ed.), I. 82.)]

Animals on highway

779. Subject to §§ 781 and 784, where a domesticated animal, being lawfully upon a highway, trespasses upon land adjoining the highway, there is no liability unless negligence is proved against the defendant.

Dovaston v. *Payne* (1795) 2 H. Bl. 527.
Goodwyn v. *Cheverly* (1859) 28 L. J. Ex. 298.
Tillett v. *Ward* (1882) 10 Q. B. D. 17.

"Scienter"

780. Subject to §§ 781 and 784, where a domesticated animal does damage of a kind not usual for such an

animal to commit, there is no liability; unless it is proved that the defendant was aware of a tendency on the part of the animal to commit such damage ("*scienter*"),[a] or that such damage was caused by his negligence.[b] If knowledge of such tendency is proved, absence of negligence is no defence.[c]

(a) *Hartley* v. *Harriman* (1818) 1 B. & Ald. 620.
Cox v. *Burbidge* (1863) 13 C. B. N. S. 430.
Osborne v. *Chocqueel* [1896] 2 Q. B. 109.
(b) *Jackson* v. *Smithson* (1846) 15 M. & W. 563.
(c) *Jackson* v. *Smithson, ubi sup.* (ram).
Hudson v. *Roberts* (1851) 6 Exch. 697 (bull).
Cox v. *Burbidge* (1863) 13 C. B. N. S. 430 (horse).
Barnes v. *Lucile* (1907) 96 L. T. 680 (dog).

[It would appear that there is no distinction in this respect between a domesticated animal known to be dangerous, and an animal *feræ naturæ* (*Jackson* v. *Smithson, ubi sup.*, at p. 565, *per* Alderson, B).]

Dogs and cattle

781. The owner of a dog is liable in damages for injury done by the dog to cattle, horses, mules, asses, sheep, goats, and swine; whether or not such owner was aware of a propensity in the dog to do such injury, and whether or not the injury is attributable to any negligence on the part of such owner.

Dogs Act, 1906, s. 1.

[The occupier of any house or premises where the dog is kept or permitted to live, is, for the purposes of this §, presumed to be the owner of the dog; unless he proves that he was not the owner (Dogs Act, 1906, s. 7).]

Dogs and other objects

782. Subject to § 781, a person who keeps a dog is (probably) not liable for any damage committed by it[a]; unless *scienter* or negligence is proved.[b]

(a) *Mason* v. *Keeling* (1700) 1 Ld. Raymond, 606.
Read v. *Edwards* (1864) 17 C. B. N. S. 245.
Sanders v. *Teape* (1884) 51 L. T. 263.
(But see *Cox* v. *Burbidge* (1863) 13 C. B. N. S., at pp. 400–401.)
(b) *Hartley* v. *Harriman* (1818) 1 B. & Ald. 620.
Osborne v. *Chocqueel* [1896] 2 Q. B. 109.

Damage by wild animals

783. Subject to section 2 of the Agricultural Holdings Act, 1906, an occupier of land is not liable for damage done to his neighbour's crops by wild animals living in their natural liberty on his land;[a] (*semble*) unless he has deliberately introduced and fostered such animals to an unreasonable extent.[b]

(a) *Bowlston* v. *Hardy* (1597) Cro. Eliz. 547.
Brady v. *Warren* [1900] 2 Ir. Rep. (Q. B. D.) 632.
(b) *Farrer* v. *Nelson* (1885) 15 Q. B. D. 258.
O'Gorman v. *O'Gorman* [1903] 2 Ir. Rep. (K. B. D.) 573.

[*Bowlston* v. *Hardy* has been a good deal criticised; but it would seem that its main proposition is still law. For the limits and peculiar methods of enforcing a claim to compensation by the tenant of an agricultural holding, see the Act.]

Dangerous animals

784. A person who keeps an animal of a dangerous, ferocious, or (?) mischievous kind, does so at his own peril; and will be liable for any damage inflicted by

such animal, without proof of negligence or knowledge of its vicious propensities.

May v. *Burdett* (1846) 9 Q. B. 101.
Nichols v. *Marsland* (1875) L. R. 10 Ex., at p. 260; in which case Bramwell, B., suggested that not even the "act of God" would be a defence. (And see *Baker* v. *Snell* [1908] W. N. 122.)
Filburn v. *People's Palace Co.* (1890) 25 Q. B. D. 258 (C. A.).

[There appears to be some little doubt as to how long the liability would remain after the animal had regained its freedom (*Cox* v. *Burbidge* (1863) 13 C. B. N. S., at p. 439). Probably the true test is, whether the damage was really caused by the defendant's "keeping." If the defendant had imported a foreign animal, *e. g.* a tiger, and it escaped, and, after running wild for some months, attacked the plaintiff, the damage might fairly be said to be caused by the defendant's act. But if the defendant had merely tamed a native fox, which had subsequently escaped, and, after a similar interval, robbed the plaintiff's hen-roost, it might be held that the damage was not caused by the defendant's act. (See *Mitchell* v. *Alestree* (1677) 1 Vent. 295.) There appears to be no authority on the question whether a person who keeps an animal (not domesticated) of a kind usually harmless, is liable (apart from negligence) if it commits damage.]

Destruction of dogs

785. The proper remedy for trespass by domesticated animals is action or distress (*ante*, Book I, § 180); not destruction of the animals.[a] But a man is justified in destroying a dog trespassing upon his land; if it is necessary to prevent the killing or maiming of animals (even *feræ naturæ*) thereon.[b]

(a) *Dewell* v. *Sanders* (1618) Cro. Jac. 490.
(b) *Wadhurst* v. *Damme* (1604) Cro. Jac. 44.
Wright v. *Ramscot* (1667) 1 Wms. Saund. 82.
Barrington v. *Turner* (1681) 3 Levinz, 28.
Jansen v. *Brown* (1807) 1 Camp. 41.
Wills v. *Read* (1831) 4 C. & P. 568.

[The last two cases show that the Court is somewhat reluctant to recognise the justification.]

Dogs and other objects

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Damage by wild animals

Danger animals

if the deceased were living, would be liable to an action for damages in respect of such wrongful act, neglect, or default; even though such act, neglect, or default amounted to a felony;

Fatal Accidents Act, 1846.
Read v. *G. E. Ry. Co.* (1868) L. R. 3 Q. B. 555.

but —

(i) every such suing must be for the benefit of the wife, husband, parent, and child of the deceased;

[For the extended meaning of these words see s. 5 of the Act.]

(ii) the amount of the damages recoverable thereby is limited to the pecuniary loss directly resulting to such persons from the death of the deceased;

Blake v. *Midland Ry. Co.* (1852) 18 Q. B. 93.

(iii) any damages recovered thereby (after deducting costs not recovered from the defendant) must be divided among such of the above-mentioned persons in such shares as the jury shall by their verdict direct;

(iv) the action must be brought within twelve calendar months from the death of the deceased.

[If there is no personal representative, or if the personal representative neglects to sue for six calendar months from the death, the persons beneficially interested may bring the action (Fatal Accidents Act, 1864). For the special rules as to the assessment of damages under this Act, see *post*, Tit. VII, § 799 (note).]

(*c*) Where an injury causes the death of the injured party, liability may arise under the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1906.

[Further details as to these claims will be found later on.]

(*d*) Claims under the Workmen's Compensation Act, 1906, are not extinguished by the death of the workman injured; even though the death was not caused by the accident.

Workmen's Compensation Act, 1906, s. 13.

[The case appears to be otherwise with regard to claims under the Employers' Liability Act, 1880 (*McCarthy* v. *Jacob and Richardson*, quoted by Ruegg, *Employers' Liability, &c.* (7th edn.), p. 133).]

Death of tort-feasor

787. The death of the person committing the tort extinguishes his liability; except in the following cases: —

(i) Where a person has wrongfully appropriated the chattels personal of another and therewith increased his own estate, an action will lie against his representatives to recover the value of the property appropriated;

Hambly v. *Trott* (1776) 1 Cowp. 371.
Phillips v. *Homfray* (1883) 24 Ch. D. 439.

[Of course land can be recovered in ejectment after the death of the ejector.]

(ii) Where a person has, within six calendar months prior to his death, committed a tort against another, in respect of the latter's real or personal

property, an action will lie against the personal representatives of the wrong-doer in respect thereof. But such action must be brought within six calendar months after such personal representatives have taken upon themselves the administration of the deceased's property;

Civil Procedure Act, 1833, s. 2.

(iii) Claims under the Workmen's Compensation Act, 1906, are not extinguished by the death of the person liable in respect thereof.

Workmen's Compensation Act, 1906, s. 13.

[The rule is otherwise with regard to claims under the Employers' Liability Act, 1880 (*Gillett* v. *Firbank* (1887) III T. L. R. 618).]

Assignment of action in Tort

788. The right to recover damages for a tort cannot be transferred by voluntary assignment;

May v. *Lane* (1894) 64 L. J. Q. B. 236.
Dawson v. *G. N. & City Ry. Co.* [1904] 1 K. B. 277. (The general view of Wright, J., was not questioned by the C. A.)

[But see *Cohen* v. *Mitchell* (1890) 25 Q. B. D. 262, and *King* v. *Victoria Insurance Co.* [1896] A. C. 290 (P. C.).]

except that:—

(i) rights of action in Tort which pass to a trustee in bankruptcy,[a] or which can be exercised by the liquidator of a company,[b] may be by him assigned to a stranger;

(a) *Seear* v. *Lawson* (1880) 15 Ch. D. 426.
(b) *Re Park Gate Waggon Works Co.* (1881) 17 Ch. D. 234.

(ii) a claim under the Lands Clauses Consolidation Act, 1845, to compensation in respect of lands injuriously affected by a public undertaking in the lawful exercise of statutory powers, is not a claim to recover damages for a tort within the meaning of this §.

Dawson v. *G. N. & City Ry.* [1905] 1 K. B. 260 (C. A.).

[Probably this principle would be held to apply to all cases of claims to compensation under Acts of a similar character.]

Assignment of liability in tort

789. A liability in Tort cannot be transferred by voluntary assignment.

[It is not easy to find an express authority for this statement; but it is conceived that it is indisputable.]

Rights of bankrupt

790. The right to recover damages for a tort, committed before or since the commencement of the bankruptcy, which is substantially a personal wrong to a bankrupt, does not pass to his trustee in bankruptcy.[a] But a right to recover damages for a tort which causes a direct pecuniary loss to the bankrupt, passes to or may be claimed by the trustee according to the provisions of Book I, § 70.[b]

(a) *Howard* v. *Crowther* (1841) 8 M. & W. 601 (Act of 1836).
Brewer v. *Dew* (1843) 11 M. & W. 625 (do.).
Rogers v. *Spence* (1846) 12 Cl. & F. 700 (do.).
Re Wilson (1878) 8 Ch. D. 364 (C. A.) (Act of 1869).
Rose v. *Buckett* [1901] 2 K. B. 449 (Act of 1883).

(b) *Beckham* v. *Drake* (1847) 2 H. L. C. 579. (But this was really a claim on contract.)
Hodgson v. *Sidney* (1866) L. R. 1 Ex. 313.

Double claims

791. Where the same act or omission gives rise to two distinct torts, one of which is to the person, and the other to the property, *semble*, the right to sue on the latter passes to or may be claimed by the trustee in bankruptcy of the person injured, according to the provisions of Book I, § 70; whilst the right to sue on the other remains in the bankrupt.

Rogers v. *Spence*, *ubi sup.*, at p. 721, *per* Lord Campbell.
Hodgson v. *Sidney*, *ubi sup.*, at p. 316, *per* Bramwell, B.
Darley Main Colliery Co. v. *Mitchell* (1886) L. R. 11 App. Ca., at p. 145, *per* Lord Bramwell.

[But when a single cause of action causes both personal and proprietary damage, it is doubtful whether there can be any severance of action (*Hodgson* v. *Sidney*, *ubi sup.*; and *Morgan* v. *Steble* (1872) L. R. 7 Q. B. 611).]

Liabilities of bankrupt

792. A liability in Tort is not extinguished by the bankruptcy of the wrong-doer; but a claim for unliquidated damages in respect of a tort committed by a bankrupt before the commencement of the bankruptcy cannot be proved in the bankruptcy, unless the amount of the damages was ascertained by judgment before the date of the receiving order.

Bankruptcy Act, 1883, s. 37 (1).
Re Newman (1876) 3 Ch. D. 494 (C. A.) (Act of 1869).
Re British Goldfields of W. Africa [1899] 2 Ch. 7. (Act of 1883.)

[By section 10 of the Judicature Act, 1875, the rules of bankruptcy on this point apply equally in the winding-up of insolvent companies by the Court. But a claim for the value of specific goods which have passed to a trustee in bankruptcy by virtue of the order and disposition clause of the Bankruptcy Act, 1883, s. 44 (2), can be proved in the bankruptcy (*Re Button* [1907] 2 K. B. 180).]

Accord and satisfaction

793. A person entitled to sue another in Tort may agree with the person liable to accept some act in satisfaction of his claim. When such act has been performed, the agreement and performance discharge the right of action.

Peytoe's Case (1611) 9 Co. Rep. 77 b.
Boosey v. *Wood* (1865) 3 H. & C. 484.

[There would also seem to be little doubt that, as in the case of claims on contract (*ante*, Bk. II, Pt. I, § 351), a claim in Tort may be discharged by mere agreement, if such agreement is expressly accepted as satisfaction. (See *Hall* v. *Flockton* (1851) 14 Q. B., at p. 386, affirmed 16 Q. B. 1039.) But there does not appear to be any express authority on the subject.]

Release of right

794. A right of action in Tort may be discharged by release under seal; and no consideration is necessary for the validity of such release.

Jones v. *Bonner* (1848) 2 Exch. 230.

[A release must be specially pleaded. R. S. C., 1883, O. XIX, r. 15.]

Limitation of actions

795. A right of action in Tort will be barred by the expiration of the respective periods specified in Book I, § 159, and Bk. II, Pt. III, §§ 757, 786, and 787; but subject to the various savings for disabilities and other exceptions described in Book I, §§ 160–169.

TITLE VII — REMEDIES FOR TORTS

Pecuniary damages

796. The normal and primary remedy of a person injured by the commission of a tort is an action for pecuniary damages. He may also, in addition or substitution, have other remedies; *e.g.*, recaption (*ante*, Bk. I, § 177), distress (*ante*, Bk. I, § 180), abatement (*ante*, Bk. I, § 181, and *post*, §§ 843–848), injunction (*post*, §§ 805–808), account (*post*, § 809), re-entry (*post*, §§ 817, 819), restitution (*post*, § 810), replevin (*post*, § 867), penalties (*post*, § 891 n.).

[In this Title damages are dealt with only so far as the general principles affecting their measure and incidence are concerned. For the special rules affecting particular torts, see under such torts respectively.]

Measure of damages

797. The amount of the damages in an action of Tort is a question for the jury;[a] but the proper measure of damages is, in general, the loss which the plaintiff has suffered as the "natural and probable" consequence (*ante* § 724) of the commission of the tort.[b]

(a) *Duberley* v. *Gunning* (1792) 4 T. R. 651.
Rowley v. *L. & N. W. Ry. Co.* (1873) L. R. 8 Ex. 221.
Johnston v. *G. W. R.* [1904] 2 K. B. 250.
Watt v. *Watt* [1905] A. C., at p. 121.

(b) *Hadley* v. *Baxendale* (1854) 9 Exch. 541.
The Notting Hill (1884) 9 P. D., at 113, *per* Brett, M.R.

[So far as remoteness is concerned, the measure of damages is the same in Tort as in Contract (*The Notting Hill*, *ubi sup.*).]

Exemplary and nominal damages

798. The jury may take into account matter of aggravation, and may award vindictive or exemplary damages; especially in the following cases: —

(i) Where the tort was committed in an insulting manner;

Merest v. *Harvey* (1814) 5 Taunt. 442.

(ii) Where the conduct of the defendant has been malicious or high-handed;

Emblen v. *Myers* (1860) 6 H. & N. 54.
Bell v. *M. R. Co.* (1861) 10 C. B. N. S. 287.

(iii) Where the defendant has been guilty of seduction or brutal conduct;

Tullidge v. *Wade* (1769) 3 Wils. 18.

(iv) Where the plaintiff has been deprived of a constitutional right.

Huckle v. *Money* (1763) 2 Wils. 205.

[But the jury ought not to treat such matter of aggravation as giving a separate or independent right to damages (*Anderson* v. *Calvert* (1908) XXIV T. L. R. 399).]

On the other hand, the jury may award nominal or contemptuous damages; where: —

(i) The action is brought merely to establish the plaintiff's right (nominal damages);

Marzetti v. *Williams* (1830) 1 B. & Ad. 415.
The Mediana [1900] A. C., at p. 16, *per* Halsbury, L. C.

(ii) The plaintiff, though technically justified, ought not, in the opinion of the jury, to have brought the action (contemptuous damages).

Cooke v. *Brogden* (1885) I T. L. R. 497.

[In the latter case, the plaintiff may be deprived of his costs, or even ordered to pay those of the defendant (*Harris* v. *Petherick* (1879) 4 Q. B. D. 611).]

Estimate of damages

799. The jury may not take into account the means of the defendant,[a] nor the fact that the plaintiff has insured against the loss.[b]

(a) *Hodsoll* v. *Taylor* (1873) L. R. 9 Q. B. 79.
(b) *Bradburn* v. *G. W. R.* (1874) L. R. 10 Ex. 1.

[There is, apparently, a partial exception from the last rule in the case of claims under the Fatal Accidents Act, 1846 (*Hicks* v. *Newport, &c. Ry.* (1857) 4 B. & S. 403 n.; *Grand Trunk Ry.* v. *Jennings* (1888) L. R. 13 App. Ca. 800).]

New trial

800. Where the damages awarded by the jury are unreasonably large,[a] or unreasonably small,[b] the Court may order a new trial of the action.

(a) *Cox* v. *English, &c. Bank* [1905] A. C. 168.
(b) *Phillips* v. *L. S. W. Ry. Co.* (1879) 4 Q. B. D. 406; 5 Q. B. D. 168.

But the Court will not disturb the verdict of the jury on these grounds unless it is convinced: —

(i) that certain material points have not been taken into consideration at all by the jury, or that irrelevant matters have been taken into consideration; or

Phillips v. *L. S. W. Ry. Co.* (1879) 5 C. P. D. 280.
Johnston v. *G. W. R.* [1904] 2 K. B. 250.

(ii) that the verdict is no true verdict at all, but the result of a mere compromise; or,

Falvey v. *Stanford* (1874) L. R. 10 Q. B. 54.

(iii) that the verdict is such that no twelve reasonable men could have given it unless swayed by prejudice or passion.

Metropolitan Ry. Co. v. *Wright* (1886) L. R. 11 App. Ca. 152.
Praed v. *Graham* (1889) 24 Q. B. D. 53 (approved in *Johnston* v. *G. W. R.*, *ubi sup.*, at p. 255).

[The Court has no power to alter the assessment of damages; though it may order a new trial (*Watt* v. *Watt* [1905] A. C. 115).]

Continuing torts

801. Where the cause of action is a continuing injury, giving rise to a continuing loss, a fresh cause of action arises *de die in diem*. But damages will be assessed down to the date of the assessment; and in respect of future damage a fresh action must be brought.

Holmes v. *Wilson* (1839) 10 A. & E. 503.
Whitehouse v. *Fellowes* (1861) 10 C. B. N. S. 765.
Hole v. *Chard Union* [1894] 1 Ch. 293.

[The principle seems to be, that if, in the case of a continuing trespass or nuisance, a fresh right of action did not arise from day to day, the defendant might by means of his wrongful act acquire title to an estate or easement. It must be remembered, that the payment of damages in such cases does not amount to a purchase of the right to continue the act complained of.]

One tort, one action

802. All loss arising from a single cause of action, including prospective loss, must be recovered once for

all in the same action;[a] but (*semble*) no damages can be awarded in respect of a merely apprehended tort.[b]

(a) *Hodsoll* v. *Stallebrass* (1840) 11 A. & E. 301.
Darley Main Colliery Co. v. *Mitchell* (1886) L. R. 11 App. Ca., at pp. 132, 144.

(b) *Non obstante* s. 2 of the Chancery Amendment Act, 1858.
Dreyfus v. *Peruvian Guano Co.* (1889) 43 Ch. D. 316.
Cowper v. *Laidler* [1903] 2 Ch. 337.
(But see *Holland* v. *Worley* (1884) 26 Ch. D. 578, and *Martin* v. *Price* [1894] 1 Ch., at p. 284.)

New loss, new tort

803. Where the loss arising from the act or omission of the defendant, and not the act or omission itself, is the cause of action, a fresh cause of action arises so often as fresh loss results; and damages therefor are only claimable in such fresh action.

Darley Main Colliery Co. v. *Mitchell, ubi sup.*
Crumbie v. *Wallsend Local Board* [1891] 1 Q. B. 503.
And see *Greenwell* v. *Low Beechburn Colliery Co.* [1897] 2 Q. B. 165.

[The result of these last two rules is, *e. g.*, that a landowner whose land subsides owing to his neighbour working coal in his (the neighbour's) own land, is entitled to damages for all loss arising from that particular subsidence; but not for depreciation in value of his land due to the risk of further subsidence. If future subsidence takes place, he will be able to bring a fresh action (*West Leigh Colliery Co* v. *Tunnicliffe* [1908] A. C. 27).]

One act, two torts

804. When the same act or omission infringes different rights of the plaintiff, the latter may sue separately in respect of each right. In any case, he will be entitled to damages in respect of each.

Brunsden v. *Humphrey* (1884) 14 Q. B. D. 141.
Darley Main Colliery Co. v. *Mitchell, ubi sup.*, at p. 144, *per* Lord Bramwell.

Injunction

805. The Court may in its discretion grant an injunction prohibiting the commission, continuance, or repetition of a tort;[a] but in a *quia timet* action brought to restrain the commission of an apprehended tort, the Court will not grant an injunction unless there is a strong probability that the apprehended loss will actually arise.[b]

(a) *Crowder* v. *Tinkler* (1816) 19 Ves. 622.
(b) *Earl of Ripon* v. *Hobart* (1834) 3 Myl. & K. 169.
A. G. v. *Corp. of Manchester* [1893] 2 Ch. 87.
A. G. v. *Corp. of Nottingham* [1904] 1 Ch. 673.

Grounds for injunction

806. The Court will, in the exercise of its discretion, grant an injunction where there is a reasonable apprehension of the continuance or repetition of a tort, and where the loss caused by such continuance or repetition could not be adequately compensated by the payment of damages; and particularly where: —

(i) the proprietary rights of the plaintiff would be interfered with by a continuance or repetition of the tort; or,

Southey v. *Sherwood* (1817) 2 Mer., at p. 438 (copyright).
Bacon v. *Jones* (1839) 4 My. & Cr., at p. 436 (patent).
Hilton v. *Earl Granville* (1841) Cr. & Ph., at p. 292 (land).
Harman v. *Jones* (1841) *ibid.*, at p. 301 (do.).
A. G. v. *Sheffield Gas Consumers Co.* (1853) 3 De G. M. & G., at p. 320.
Thorley v. *Massam* (1877) 6 Ch. D., at p. 588.
Baird v. *Wells* (1890) 44 Ch. D., 661.

(ii) the loss caused would be irreparable; or,

A. G. v. *Forbes* (1836) 2 Myl. & Cr. 123.
Cooke v. *Forbes* (1867) L. R. 5 Eq., at p. 172.
A.G. v. *Cambridge Consumers Gas Co.* (1868) L. R. 4 Ch. App., at p. 81.

(iii) the loss is present and continuous; or,

Soltau v. *de Held* (1851) 2 Sim. N. S. 133.
A. G. v. *Cambridge Consumers Gas Co.*, *ubi sup.*, at p. 81.
Inchbald v. *Robinson* (1869) L. R. 4 Ch. App. 388.

(iv) a repetition of the tort would necessitate an incessant series of actions for its prevention; or,

Soltau v. *de Held*, *ubi sup.*, at p. 152.
Clowes v. *Staffordshire Waterworks Co.* (1872) L. R. 8 Ch. App., at p. 143.

(v) the defendant asserts a right to repeat,[a] or an intention of repeating,[b] the injury; or

(a) *A. G.* v. *Sheffield Gas Consumers Co. ubi sup.*, at p. 315.
Stanford v. *Hurlstone* (1873) L. R. 9 Ch. App. 116.
(b) *Roberts* v. *Gwyfrai District Council* [1899] 2 Ch. 608.

(vi) the defendant has acted in a high-handed manner, or with knowledge of the illegality of his action, or has endeavoured to steal a march upon the plaintiff, or to evade an injunction applied for by the plaintiff, or an order of the Court.

Von Joel v. *Hornsey* [1895] 2 Ch. 774.
Colls v. *Home and Colonial Stores* [1904] A. C., at p. 193, *per* Lord Macnaghten.

[The injunction may be granted before the trial of the action, by way of interlocutory order, in all cases where it appears to the Court to be just and convenient that such an order should be made (Judicature Act, 1873, s. 25 (8), as interpreted by *Day* v. *Brownrigg* (1878) 10 Ch. D. 294). But interlocutory orders are only granted with caution, when the Court is satisfied that the matter is urgent, that there is a serious question to be tried at the hearing, and that, on the facts before it, there is a probability that the plaintiff is entitled to relief (*Preston* v. *Luck* (1884) 27 Ch. D., at p. 500), and, in cases of libel, only when "it is clear that if a jury gave a verdict for the defendants, it would be set aside as unreason-

able" (*Bonnard* v. *Perryman* [1891] 2 Ch. 269; approved in *Monson* v. *Tussaud* [1894] 1 Q. B. 671). The Court always demands, as a condition of granting an interlocutory order, that the plaintiff shall undertake to indemnify the defendant against the loss caused by the order; if at the trial it shall appear that there is no case for an injunction. But the Court cannot compel a plaintiff to accept an order on such terms (*Tucker* v. *New Brunswick Trading Co.* (1890) 44 Ch. D. 249).]

Mandatory order

807. The ordinary injunction is merely prohibitory; but where the tort complained of consists in the creation of a physical obstruction or interruption of a permanent nature, which would cause permanent and substantial loss to the plaintiff unless removed,[a] and the plaintiff makes speedy application to the Court,[b] especially if the tort has been committed after notice of the plaintiff's claims,[c] or after action brought,[d] the Court may grant a mandatory order compelling the defendant to remove such obstruction, or otherwise to restore things to the condition in which they were at the time when the plaintiff's complaint was made.[e]

(a) *Smith* v. *Smith* (1875) L. R. 20 Eq. 500.
(b) *Smith* v. *Smith*, *ubi sup.*
(c) *Smith* v. *Day* (1880) 13 Ch. D. 651.
(d) *Krehl* v. *Burrell* (1877) 7 Ch. D. 551; 11 Ch. D. 146. *Daniel* v. *Ferguson* [1891] 2 Ch. 27.
(e) *Isenberg* v. *E. I. Ho. Co.* (1863) 3 De G. & S., at p. 272.

[This order used only to be granted in indirect language. The defendant was "restrained from permitting (the obstruction) to remain." But this scruple is now abandoned (*Jackson* v. *Normanby Brick Co.* [1899] 1 Ch. 438). It is clear that, since the Judicature Act, the Court has had power to grant even a mandatory injunction by way of interlocutory order; though such power will only be exercised with great caution (*Daniel* v. *Ferguson*, *ubi sup.*; *Von Joel* v. *Hornsey* [1895] 2 Ch. 774).]

808. Even where an injunction would be the *primâ facie* remedy, the Court may, if it thinks fit, award damages in lieu thereof; *Damages in lieu of injunction*

Chancery Amendment Act, 1858, s. 2.

[The statute is repealed by the Statute Law Revision and Civil Procedure Act, 1883, s. 3; but the jurisdiction is saved by s. 5 (b) of the latter statute (See *Sayers* v. *Collier* (below); and *Re R.* [1906] 1 Ch. 730).]

and will do so if either: —

(i) the plaintiff has been guilty of acquiescence, which, though not sufficient to deprive him of all remedy, will incline the Court to refuse an injunction; or

Eastwood v. *Lever* (1863) 3 D. J. & S. 103.
Sayers v. *Collyer* (1884) 28 Ch. D. 103.

(ii) the injury to the plaintiff's legal rights is small, and is capable of being adequately estimated in money and compensated by a small money payment, and it would be oppressive to the defendant to grant an injunction; or

Shelfer v. *City of London Electric Light Co.* [1895] 1 Ch., at p. 322.

[The exercise of the discretion is not confined to cases in which mandatory orders are applied for. *Ibid.*, at p. 319.]

(iii) the plaintiff is unreasonably insisting on his legal rights, and has suffered no substantial damage.

Llandudno Urban Council v. *Woods* [1899] 2 Ch. 705.
Behrens v. *Richards* [1905] 2 Ch. 614.

SECTION II

TORTS IN RESPECT OF LAND

TITLE I—TRESPASS

Definition

811. Trespass to land is any unauthorised interference, however slight,[a] by means of a voluntary act,[b] with the possession of land; whether such interference is or is not intentional.[c]

(a) *Entick* v. *Carrington* (1765) 2 Wils., at p. 291.
(b) *Holmes* v. *Mather* (1875) L. R. 10 Exch. 261 (not land).
Stanley v. *Powell* [1891] 1 Q. B. 86 (do.).

[*Quære*, if the interference, though not effected by means of a voluntary act, is due to the negligence of the defendant (*Weaver* v. *Ward* (1616) Hob. 134; *Holmes* v. *Mather*, at p. 269).]

(c) *Baseley* v. *Clarkson* (1680) 3 Levinz, 37.
Gregory v. *Piper* (1829) 9 B. & C. 591.

[The proper remedy under the old procedure for trespass to land was a writ of Trespass *quare clausum fregit*. But where the harm was not immediate but consequential, or where the injury was regarded as being done to a right and not to possession, as, *e. g.*, the disturbance of an easement, or where the party injured had an interest in reversion or remainder but not in possession, the proper remedy was Case. Case was a very general form of action, based on the Statute of Westminster the Second; and it became the remedy for numerous torts besides injuries to land, *e.g.*, libel, slander, and conversion. It developed a variety of specialised forms, generally known by the name of the particular tort remedied. The gist of this action was the damage caused by the infringement of another's legal rights. For historical reasons, the action founded on the straying of cattle (*ante*, § 778) is Trespass.]

Extent of possession

812. An action of Trespass lies for interference with the possession of the sub-soil or minerals beneath the surface of land,[a] or of the air space incumbent thereon;[b] but (*semble*) this right, for the purpose of suing in Trespass, is limited to so much of the air space above as the plaintiff can show to have been in his effective control.

(a) *Martin* v. *Porter* (1839) 5 M. & W. 351.
Goodson v. *Richardson* (1874) L. R. 9 Ch. 221.
Pountney v. *Clayton* (1883) 11 Q. B. D., at p. 838.
Mayor of Tunbridge Wells v. *Baird* [1896] A. C. 434.

(b) In *Pickering* v. *Rudd* (1815) 4 Campb. 219, Lord Ellenborough thought that an interference with the column of air superincumbent on a close was not remediable by Trespass *quare clausum fregit*, but by Case — *i. e.* damage must be proved. (See also *Fay* v. *Prentice* (1845) 14 L. J. C. P. 298.) But see *Kenyon* v. *Hart* (1865) 6 B. & S., 249; *Wandsworth Board* v. *United Telephone Co.* (1884) 13 Q. B. D. 904; *Lemmon* v. *Webb* [1894] 3 Ch., at p. 20; *Betts* v. *Pickford* [1906] 2 Ch. 87.

Who may bring trespass

813. An action of Trespass to land can be brought by any person who is *de facto* in exclusive possession of the land;[a] whether such possession is with or without title.[b]

(a) *Crosby* v. *Wadsworth* (1805) 6 East, at p. 609.
(b) *Cary* v. *Holt* (1746) 2 Stra. 1238.
Harker v. *Birkbeck* (1764) 3 Burr. 1563.
Graham v. *Peat* (1801) 1 East, 244.
Ryan v. *Clark* (1849) 14 Q. B. 65.

[It seems that when the plaintiff was entitled to the exclusive enjoyment of the vesture or herbage of the land, or of several fishery or free warren *in alieno solo*, he was also allowed to bring the action of Trespass (Co. Litt. 46; *Wilson* v. *Mackreth* (1766) 3 Burr. 1824; *Crosby* v. *Wadsworth* (1805) 6 East, 602; *Holford* v. *Bailey* (1849) 8 Q. B. 1000; 13 Q. B. 426).]

Tenant at will

814. Where a trespass has been committed in respect of land in the occupation of a tenant at will, either the tenant at will or the immediate landlord can sue.

Bro. Ab. *Trespass*, pl. 131.
Attersoll v. *Stephens* (1808) 1 Taunt., at p. 190 (*per* Mansfield, C. J.).

Lodger

815. A lodger who has contracted for the exclusive use of a specific room or rooms in a house can (probably) sue in Trespass, even against his landlord;[a] but not a lodger who is bound to take such a room as his landlord may from time to time assign to him.[b]

(a) *Dean* v. *Hogg* (1834) 10 Bing., at p. 351; *Lane* v. *Dixon* (1847) 3 C. B. 776. (But see *dicta* in *Allan* v. *Overseers of Liverpool* (1874) L. R. 9 Q. B., at p. 191, 192; and *Holywell Union* v. *Halkyn Drainage Co.*, [1895] A. C., at pp. 126, 134. These were, however, both rating cases; in which other considerations apply.)
(b) *Wright* v. *Stavert* (1860) 29 L. J. Q. B. 161.

Occupier

816. Where the occupier of land has a certain and exclusive interest, he alone can sue in Trespass.

Ward v. *Macauley* (1791) 4 T. R. 489. (This was a case of goods; but the reasoning applies.)
Baxter v. *Taylor* (1832) 4 B. & Ad. 72.

Temporary ejectment

817. A person who is in possession of land, whether with or without title, and who is expelled by a mere trespasser, may, before such trespasser

has acquired possession, forcibly re-enter and eject him; and a wrong-doer cannot, by merely evicting the possessor, put the latter to proof of his title.

Browne v. *Dawson* (1840) 12 A. & E. 624.
Laws v. *Telford* (1876) L. R. 1 App. Ca. 414.

Entry

818. A person entitled to the immediate possession of land may make a peaceable entry thereon; and such entry will have the effect of vesting the possession in him,[a] notwithstanding that another person remains without title on the land.[b] If a person so entitled makes a forcible entry on land, he will be liable to indictment;[c] but he will nevertheless obtain possession of the land,[d] and will not be liable to a civil action for damages for such entry,[e] though he will be civilly liable for any assault or injury to goods committed in the course thereof.[f]

(a) *Laws* v. *Telford* (1876) L. R. 1 App. Ca. 414.
(b) *Butcher* v. *Butcher* (1827) 7 B. & C. 399.
Jones v. *Chapman* (1847) 2 Exch., at p. 821 (approved in *Laws* v. *Telford*, *ubi sup.*, at p. 426).
(c) 5 Ric. II. (1381) c. 7.
8 Hen. VI (1429) c. 9.
(d) *Turner* v. *Meymott* (1823) 1 Bing. 158.
Harvey v. *Brydges* (1845) 14 M. & W. 437; 1 Exch. 261 (approved in *Laws* v. *Telford*, *ubi sup.*, at p. 426, *non obstante Newton* v. *Harland* (1840) 1 M. & Gr. 644).
(e) *Burling* v. *Read* (1850) 11 Q. B. 904.
(f) *Beddall* v. *Maitland* (1881) 17 Ch. D. 174.
Edwick v. *Hawkes* (1881) 18 Ch. D. 199.

[In *Jones* v. *Foley* [1891] 1 Q. B. 730, it was held that there was no forcible entry.]

Relation back

819. A person entitled to the immediate possession of land is, on completing his title by entry, deemed to have been in possession of it since the time when his title accrued. He can, therefore, bring actions in respect of trespasses committed since that date,[a] and claim mesne profits for the whole of such period.[b]

(a) *Barnett* v. *Earl of Guildford* (1855) 11 Exch. 19.
Anderson v. *Radcliffe* (1858) E. B. & E. 806.
Ocean Accident Co. v. *Ilford Gas Co.* [1905] 2 K. B. 493.
(b) *Tharpe* v. *Stallwood* (1843) 5 M. & Gr., at p. 774.

Jus tertii

820. In an action for trespass to land, the defendant may justify by setting up title in himself.[a] But he cannot justify by setting up title in another (*jus tertii*); unless he proves also that he acted under the authority of that other.[b]

(a) This is called "a plea of soil and freehold," or of *liberum tenementum*. For the nature and effect of the plea, see *Ryan* v. *Clark* (1849) 14 Q. B. 65.
(b) *Chambers* v. *Donaldson* (1809) 11 East, 65.
Jones v. *Chapman* (1849) 2 Exch. 803.

Trespass ab initio

821. One who enters the land of another under an authority given by the law, and subsequently exceeds such authority by an act [a] (but not by a mere omission [b]), is deemed to have originally entered as a trespasser.

(a) *Gargrave* v. *Smith* (1691) 1 Salk. 221.
Harrison v. *D. of Rutland* [1893] 1 Q. B. 142.

[Since the Distress for Rent Act, 1737, ss. 19 and 20, this doctrine no longer applies to distress for rent; nor, since the Poor Relief Act, 1743, s. 8, to distress for poor rate.]

(b) *Six Carpenters' Case* (1610) 8 Co. Rep. 146 b.

822. An alleged trespass to land may be justified on the following grounds: — *Justification of trespass*

(i) that it has been committed under an authority conferred by the law; more particularly, where the entry complained of has been made: —

(α) into a common inn;

Six Carpenters' Case (1610) 8 Co. Rep. 146 b.

(β) by a reversioner, to see if waste has been committed;

Ibid.

(γ) by a landlord, for the purpose of demanding rent or levying a distress;

Co. Litt. 201 b.
Eagleton v. *Gutteridge* (1843) 11 M. & W. 465.
Grunnell v. *Welch* [1905] 2 K. B. 650.

(δ) in the lawful execution of lawful process;

Semayne's Case (1604) 5 Co. Rep. 91 a.
Cooke v. *Birt* (1814) 5 Taunt. 764.

(ϵ) to prevent the commission of murder;

Handcock v. *Baker* (1800) 2 B. & P. 260.

(ζ) to abate a private nuisance which cannot otherwise be abated;

Jones v. *Williams* (1845) 11 M. & W. 176.
Lemmon v. *Webb* [1894] 3 Ch., at p. 13; [1895] A. C., at p. 5.

[For the law as to abatement, see *post*, §§ 843–848.]

(η) in the exercise of a lawful custom;

Tyson v. *Smith* (1838) 9 A. & E. 406.
Mercer v. *Denne* [1905] 2 Ch. 538.

[Fox-hunting is not recognised as such a custom (*Paul* v. *Summerhayes* (1878) 4 Q. B. D. 9).]

(θ) for the defence of the realm, or to prevent the spread of fire;

9 Edw. IV (1470) 35, pl. 10.
21 Hen. VII (1506) 27 b, pl. 5.
Maleverer v. *Spink* (1537) 1 Dyer, at 36 b.
Dewey v. *White* (1827) Moo. & Malk. 56, *per* Best, C. J.

(ι) to recover the goods of the defendant, which were upon the land of the plaintiff, either as the result of an accident,[a] or by the act of the plaintiff,[b] or by the felonious act of a third party;[c] but not otherwise.[d]

(a) *Millen* v. *Hawery* (1625) Latch, 13.
(b) *Patrick* v. *Colerick* (1838) 3 M. & W. 483.
(c) *Higgins* v. *Andrewes* (1620) 2 Roll. Rep. 55.
(d) *Anthony* v. *Haneys* (1832) 8 Bing. 186.

[The rule does not apply to a house (*Tayler* v. *Fisher* (1591) Cro. Eliz. 245).]

(ii) that it has been committed under licence granted by the plaintiff,[a] or in the lawful exercise of a private right of way or other easement, or of a right of common or other profit *à prendre*.[b]

(a) *Wood* v. *Manley* (1839) 11 A. & E. 34.
Wood v. *Leadbitter* (1845) 13 M. & W. 838.

[Such a licence (unless coupled with an interest) may be revoked at any time; and the licensee may then be treated as a trespasser. The revocation of the licence does not, it would seem, affect the contractual rights (if any) of the licensee (*Kerrison* v. *Smith* [1897] 2 Q. B. 445).]

(b) *Pomfret* v. *Ricroft* (1669) 1 Wms. Saund. 321 (approved in *Hoare* v. *Met. B. of Works* (1874) L. R. 9 Q. B. 296).
Mellor v. *Spateman* (1670) 1 Wms. Saund. 343.

823. The defendant in an action of trespass to land may plead a disclaimer of title, that the trespass was by negligence or involuntary, and a tender or offer of amends before action brought. If these issues are found for the defendant, the plaintiff is barred of his action. *Disclaimer*

Limitation Act, 1623, s. 5.
Basely v. *Clarkson* (1680) 3 Lev. 37.

824. Co-owners of land cannot bring actions of trespass against one another;[a] unless there has been actual expulsion.[b] *Co-owners*

(a) Because they are only entitled to undivided possession. (Litt. s. 323; *Jacobs* v. *Seward* (1872) L. R. 5 H. L., at p. 472.)
(b) *Wilkinson* v. *Haygarth* (1847) 12 Q. B. 837.
Murray v. *Hall* (1849) 7 C. B. 441.

[As to the rights of co-owners of land against strangers, see *ante*, § 765.]

TITLE II — DISPOSSESSION

Ejectment

825. A person entitled to the immediate possession of land can, in addition to his right to enter peaceably on the land (*ante*, § 818) recover possession against any one withholding it from him, by an action for the recovery of land in the nature of ejectment;[a] and can in the same action,[b] or separately,[c] recover damages for dispossession ("mesne profits").

(a) For the history of the action of ejectment, see Blackstone, *Commentaries*, Book III, c. 11. And see note of Serjeant Manning to report of *Butcher* v. *Butcher* (1827) 1 M. & R. 220. A person entitled to an *interesse termini* may bring ejectment, if the term is actually running (*Doe* v. *Day* (1842) 2 Q. B. 147). Since the Judicature Act, 1873, no action for the recovery of land can be defeated for want of the legal estate, where the plaintiff has the title to the possession (*General Finance Co.* v. *Liberator Soc.* (1878) 10 Ch. D., at p. 24, *per* Jessel, M. R.). (But in other cases the person in whom the legal estate is vested must be before the Court (*Allen* v. *Wood* (1893) 68 L. T. 143.)

(b) Common Law Procedure Act, 1852, s. 214; R. S. C., 1883, O. XVIII, r. 2. (The C. L. P. Act limited the right of joining a claim for mesne profits to a landlord suing his tenant in ejectment; but this restriction has been removed by the R. S. C. See *Dunlop* v. *Macedo* (1891) VIII T. L. R. 43.) It is advisable to make such a claim the subject of a special indorsement under O. III, r. 6; and, if this be done, judgment can be obtained for mesne profits up to the time of acquiring possession, under O. XIV, r. 1 (*Southport Tramways Co.* v. *Gandy* [1897] 2 Q. B. 66). But the special indorsement is only available on behalf of a landlord.

(c) Common Law Procedure Act, 1852, s. 218. And see cases quoted in last note.

Co-owners

826. A co-owner who is totally excluded from possession of the land by his co-owners may recover

possession and mesne profits against them by an action in the nature of ejectment.

Co. Litt. 199 b.
Common Law Procedure Act, 1852, s. 189.*
Goodtitle v. *Tombs* (1770) 3 Wils. 118.
Murray v. *Hall* (1849) 18 L. J. C. P., at p. 163.

[* This section is repealed by the Statute Law Revision and Civil Procedure Act, 1883, s. 3; but the principle is retained by s. 5 (b) of the latter Act.]

Onus probandi

827. The plaintiff in an action of ejectment must recover on the strength of his own title, and not on the weakness of that of the defendant.

Martin v. *Strachan* (1742) 5 T. R. 107 n.
Roe v. *Harvey* (1769) 4 Burr. 2487 (*per* Lord Mansfield, and Willes, J.).
Perry v. *Clissold* [1907] A. C. 73.

[But possession for the statutory period is a sufficient title to enable the plaintiff to recover in ejectment.

Stokes v. *Berry* (1699) 2 Salk. 421.
Harding v. *Cooke* (1831) 7 Bing. 346.]

Jus tertii

828. Subject to § 830, the defendant in an action of ejectment, unless his possession is wrongful as against the plaintiff,(a) may set up as a defence the title of another (*jus tertii*),(b) and is entitled to rely on any flaw in the title of the plaintiff.(c)

(a) *Davison* v. *Gent* (1857) 3 Jurist, N. S. 342.
Harding v. *Cooke* (1831) 7 Bing., at p. 348.
Asher v. *Whitlock* (1865) L. R. 1 Q. B. 1.

(b) *Doe* v. *Barnard* (1849) 13 Q. B. 945. (*Quære.* Only if the *jus tertii* is disclosed in the plaintiff's case.)

(c) *Doe* v. *Barber* (1788) 2 T. R. 749.
Doe v. *Barnard*, *ubi sup.*

[The criticism of the last decision uttered by Lord Macnaghten in *Perry* v. *Clissold* [1907] A. C. 73 (P. C.) does not seem to be conclusive.]

Mere trespasser

829. Possession is sufficient to support an action of ejectment against a mere trespasser; and the latter cannot put the plaintiff to proof of his title, nor set up a *jus tertii*.

Doe v. *Dyball* (1829) Moo. & Malk. 346.
Browne v. *Dawson* (1840) 12 A. & E. 624.
Davison v. *Gent* (1857) 1 H. & N. 744.
Asher v. *Whitlock* (1865) L. R. 1 Q. B. 1.

Estoppel

830. A lessee or licensee of the plaintiff in ejectment is estopped from denying the latter's title to grant the lease or licence;[a] but he may show that such title has since expired or been parted with.[b]

(a) *Doe* v. *Smythe* (1815) 4 M. & S. 347.
Doe v. *Baytup* (1835) 3 A. & E. 188.
(b) *Claridge* v. *Mackenzie* (1842) 4 M. & Gr. 142.

[Where the alleged lease was totally void by virtue of an express statute, it was held that the relationship of lessor and lessee was not created thereby (*Magdalen Hospital* v. *Knotts* (1879) L. R. 4 App. Ca. 324).]

TITLE III — NUISANCE

831. A nuisance is an act or omission whereby a person is unlawfully annoyed, prejudiced, or disturbed in the enjoyment of land;[a] whether by physical damage to the land, or by other interference with his enjoyment of the land or with his exercise of an easement, profit, or other similar right,[b] or with his health, comfort, or convenience. The fact that such an annoyance, prejudice, or disturbance legally amounts to trespass,[c] is no bar to an action of Nuisance. *Definition*

(a) The action on the case for nuisance was local in its character (*Warren* v. *Webb* (1808) 1 Taunt. 379). The assise of nuisance was a real action, and, *à fortiori*, local.

(b) *Kettle* v. *Hickeringill* (1706) 11 East, 574 n., *per* Holt, C. J.
Brocklebank v. *Thompson* [1903] 2 Ch., at p. 348. (In such cases, apparently, proof of actual damage is unnecessary.)

[The case of *Malone* v. *Laskey* [1907] 2 K. B. 141, seems to decide conclusively that a plaintiff who has neither an interest in land nor a local right cannot recover.]

(c) *Baten's Case* (1610) 9 Co. Rep. 53 b.
Wells v. *Ody* (1836) 1 M. & W., at p. 459.
Fay v. *Prentice* (1845) 1 C. B. 829.
Battishill v. *Reed* (1856) 18 C. B. 696.

[The earliest private remedies in respect of nuisance were the assise of nuisance and the writ of "quod permittat prosternere" — the latter to authorise the plaintiff to abate the nuisance. But these actions, being available only for and against freeholders, were ultimately superseded by the action of Case under the Statute of Westminster the Second; which action, however, required proof of special damage, and sounded only in damages. (See 3 Bl. Comm. 222, and remarks of Cresswell, J., in *Battishill* v. *Reed* (1856) 18 C. B., at p. 714.) Still, the right to abate, as an extra-judicial

remedy, remains in certain cases; but inasmuch as an injunction or mandatory order (*ante*, Section I, Title VII, §§ 805–808), which may be granted at the discretion of the Court, has substantially the effect of an order of abatement, it is probable that the right of abatement, as an extra-judicial exercise of authority, will tend to fall into disfavour. See, however, *Lane* v. *Capsey* [1891] 3 Ch. 411; where Chitty, J., left a plaintiff who had been refused a mandatory order, to take such steps as he might be advised to abate a nuisance on land in the occupation of a receiver appointed by the Court.]

Ground of action

832. An action of nuisance lies: —

(*a*) in respect of a nuisance as defined in § 831 (private nuisance);

[In such cases actual damage must generally be proved, except in the cases referred to in the note to Section I, Tit. I, § 723.]

(*b*) in respect of a public nuisance, whereby the plaintiff has suffered particular damage beyond that suffered by him in common with other members of the public.

Benjamin v. *Starr* (1874) L. R. 9 C. P. 400.
Lyon v. *Fishmonger's Co.* (1876) L. R. 1 App. Ca. 662.
Tottenham U. D. Council v. *Williamson* [1896] 2 Q. B. 353.
Boyce v. *Paddington Council* [1903] 1 Ch., at p. 114; affd. [1906] A. C. 1.

[For a definition of public nuisance see works on Criminal Law; and Garret, *Law of Nuisances* (3rd edn.) 1908.]

Diminution in value

833. Mere diminution of the value of the plaintiff's property does not, *per se*, constitute a nuisance; but it may be evidence as to the extent of a nuisance.

Soltau v. *De Held* (1851) 2 Sim. N. S., at p. 158.

834. An act or omission, even though it in fact causes annoyance, prejudice, or disturbance to the plaintiff, does not give rise to an action of nuisance if: — *Justification*

(*a*) it is done in the due exercise of the defendant's proprietary rights in his own land;[(a)]

(*b*) it is expressly authorised by statute, and cannot be done without occasioning the annoyance, prejudice, or disturbance complained of.[(b)]

(a) *Chasemore* v. *Richards* (1859) 7 H. L. C. 349.
Hurdman v. *N. E. Ry.* (1878) 3 C. P. D., at p. 174.
Bradford v. *Pickles* [1895] A. C. 587.

(b) *Hammersmith Ry. Co.* v. *Brand* (1869) L. R. 4 H. L. 171.
L. B. & S. C. R. v. *Truman* (1885) 11 A. C. 45.

[For the limits of the latter exception, see *ante*, Section I, Tit. II, § 756.]

835. In determining whether an act or omission complained of causes annoyance, prejudice, or disturbance to the plaintiff in his health or the enjoyment of his property, regard will be had: — *Estimate of damage*

(*a*) to the ordinary standard of living in England;

Walter v. *Selfe* (1851) 4 De G. & Smale, at p. 322.

(*b*) to the character of the locality in which the act or omission took place;

Sturges v. *Bridgman* (1879) 11 Ch. D., at p. 865.
Colls v. *Home & Colonial Stores* [1904] A. C., at p. 182.
Rushmer v. *Polsue* [1906] 1 Ch., at p. 250 (adopted on appeal by the House of Lords [1907] A. C., at p. 123).

[It would seem that the latter consideration is of less importance where the nuisance complained of is directly an injury in respect of property, than where it is an injury in respect of health (*St. Helen's Co.* v. *Tipping* (1865) 11 H. L. C., at p. 650, *per* Lord Westbury).]

(*c*) to the necessary annoyances arising from the common and ordinary use and occupation of lands and houses, or from the necessities of business.

Bamford v. *Turnley* (1862) 3 B. & S., at p. 83, *per* Bramwell, B.
Original Hartlepool Co. v. *Gibb* (1877) 5 Ch. D. 713.
Robinson v. *Kilvert* (1889) 41 Ch. D., at p. 94.
Harrison v. *Southwark & Vauxhall Co.* [1891] 2 Ch. 409. (In this case, some stress was laid on the fact that the annoyance was only temporary.)

Invalid excuses

836. If an act or omission is *primâ facie* a nuisance, it is no defence for the defendant to prove: —

(*a*) that the act or omission complained of was, *per se*, a reasonable use of the defendant's property;

Broder v. *Saillard* (1876) 2 Ch. D., at p. 701.
Sanders-Clerk v. *Grosvenor Mansions Co.* [1900] 2 Ch. 373.

(*b*) that the nuisance complained of was in existence before the plaintiff came to the place in which he suffers it;

Penruddock's Case (1598) 5 Co. Rep. 100 b.
Bliss v. *Hall* (1838) 4 Bing. N. C. 183.
Tipping v. *St. Helen's Smelting Co.* (1865) L. R. 1 Ch. App. 66.
Fleming v. *Hislop* (1886) L. R. 11 App. Ca., at p. 697.

(*c*) that he was carrying on a useful trade in a convenient locality.

Bamford v. *Turnley* (1862) 3 B. & S. 62.
St. Helen's Smelting Co. v. *Tipping* (1865) 11 H. L. C. 642.
Rushmer v. *Polsue* [1906] 1 Ch. 234; affd. [1907] A. C. 121.

The defendant may, however, (*semble*) defeat the action by proving a prescriptive right to do the acts complained of.

Elliotson v. *Feetham* (1835) 2 Bing. N. C. 134.
Bliss v. *Hall* (1838) 4 Bing. N. C., at p. 186.
Crump v. *Lambert* (1867) L. R. 3 Eq., at p. 413.
Sturges v. *Bridgman* (1879) 11 Ch. D., at p. 863.
Neaverson v. *Peterborough Rural Council* [1902] 1 Ch., at p. 564.
Foster v. *Warblington Urban Council* [1906] 1 K. B. 648.

[It is remarkable that there appears to be no modern case in which the defence of prescriptive right was successful; and it could, probably, only be successful where the defence showed that the defendant, in doing the acts complained of, was exercising a recognised easement or *profit à prendre*. It is clear that there can be no prescriptive right to commit a *public* nuisance (*Fowler* v. *Sanders* (1617) Cro. Jac. 446; *Mott* v. *Shoolbred* (1875) L. R. 20 Eq., at p. 24).]

Occupier's action.

837. The occupier of land affected by a nuisance is, *primâ facie*, the person entitled to bring the action.[a] Where the nuisance is continuous, the fact that the occupier's title arose since the act or omission which caused the nuisance, is no bar to his action.[b]

(a) *Semble*, even a weekly tenant may bring the action (*Jones* v. *Chappell* (1875) L. R. 20 Eq., at p. 543).
Westburne v. *Mordant* (1590) Cro. Eliz. 191.
(b) *Beswick* v. *Cunden* (1593) Cro. Eliz. 402.
Penruddock's Case (1598) 5 Co. Rep. 100 b.
Thompson v. *Gibson* (1841) 7 M. & W., at p. 460.

Action by reversioner

838. A reversioner also can sue where the alleged nuisance causes a permanent damage to the premises;[a] but the fact that tenants have given notice to quit in consequence of it,[b] or that the value of the premises

has depreciated,[c] is not conclusive proof of permanent damage.

(a) *Jesser* v. *Gifford* (1767) 4 Burr. 2141.
Tucker v. *Newman* (1839) 11 A. & E. 40.
Kidgill v. *Moor* (1850) 9 C. B. 364.
Metropolitan Assocn. v. *Petch* (1858) 5 C. B. N. S. 504.
Harmer v. *Knowles* (1861) 30 L. J. Ex. 102.
Meux' Brewery Co. v. *City of London Electric Light Co.* [1895] 1 Ch. 287.
(b) *Simpson* v. *Savage* (1856) 1 C. B. N. S. 347.
(c) *Jones* v. *Chappell* (1875) L. R. 20 Eq. 539.

[The cases appear to be confined to reversioners; but there would seem to be no reason why the rule should not include remaindermen.]

Claim of right

839. A nuisance, even though it might be removed at any moment, may entitle a reversioner to sue, if its continuance would be evidence adverse to the existence of a right of the plaintiff.[a] But an act, even though done under a claim of right, not being evidence of a right against the reversioner, will not entitle him to bring the action; unless it in fact causes permanent damage to the premises.[b]

(a) *Shadwell* v. *Hutchinson* (1829) Moo. & Malk., 350, *per* Lord Tenterden, C. J., at Nisi Prius.
Metropolitan Assocn. v. *Petch* (1858) 5 C. B. N. S., at p. 512.
Mott v. *Shoolbred* (1875) L. R. 20 Eq. 22.
(b) *Baxter* v. *Taylor* (1832) 4 B. & Ad. 72.

Liability of creator of nuisance

840. The person primarily liable in respect of a nuisance is the person who creates the nuisance.[a] The occupier of the land whence the nuisance proceeds is, presumably, such person.[b] But a lessor who has agreed to repair, and failed to do so, is liable in respect of any nuisance arising from such failure; [c]

and a person who lets or sells land which at that time has a continuing nuisance thereon, remains liable to third parties therefor.[d]

(a) *Rosewell* v. *Prior* (1701) 2 Salk. 460.
Thompson v. *Gibson* (1841) 7 M. & W. 456.
Saxby v. *Manchester & Sheffield Ry. Co.* (1869) L. R. 4 C. P. 198.
Nelson v. *Liverpool Brewery Co.* (1877) 2 C. P. D. 311.
(b) *Cheetham* v. *Hampson* (1791) 4 T. R. 318.
Payne v. *Rogers* (1794) 2 H. Bl. 350.
(c) *Payne* v. *Rogers*, *ubi sup.*
Russell v. *Shenton* (1842) 3 Q. B., at p. 458.
Nelson v. *Liverpool Brewery Co.*, *ubi sup.*
(d) *Thompson* v. *Gibson*, *ubi sup.*, at p. 461.
Todd v. *Flight* (1860) 9 C. B. N. S. 377.
Bowen v. *Anderson* [1894] 1 Q. B. 164.

[It appears, however, that if the lessor, in the last case, takes an express contract from the lessee to abolish the nuisance, he ceases to be liable (*Pretty* v. *Bickmore* (1873) L. R. 8 C. P. 401; *Gwinnell* v. *Eamer* (1875) L. R. 10 C. P. 658; and see *Hale* v. *Duke of Norfolk* [1900] 2 Ch., at p. 500, and *Cavalier* v. *Pope* [1905] 2 K. B., at p. 752). This doctrine seems contrary to principle; especially if the lessor knew of the existence of the nuisance when he granted the lease. *Quære*, if it would apply where the lessor was under an absolute duty to the public, *e. g.* in the case of a dangerous structure abutting on or projecting over a highway. (See *Tarry* v. *Ashton* (1876) 1 Q. B. D. 314.)]

Predecessor's nuisance

841. Where a nuisance is caused by the act or omission of the occupier's predecessor in title, the occupier is not liable unless he continues the nuisance or permits it to continue.

Penruddock's Case (1598) 5 Co. Rep. 100 b.
Greenwell v. *Low Beechburn Coal Co.* [1897] 2 Q. B. 165.
Hall v. *Duke of Norfolk* [1900] 2 Ch. 493.

[If these cases are right, it would seem that there is no remedy by action unless the nuisance arises during the lifetime of the predecessor, *e. g.* a case of subsidence due to an excavation made by a deceased predecessor. (See Civil Procedure Act, 1833, s. 2.)]

Measure of damages

842. Where the plaintiff in an action of nuisance causing physical injury to land is a public body which is under a statutory liability to restore the land to its former state, the measure of damages is not the depreciation in value of the land, but the cost of restoration.

Wednesbury Corporation v. *Lodge Holes Colliery* [1907] 1 K. B. 78.

Abatement

843. As an alternative to an action for damages, the person injured by the existence of a private nuisance may himself remove the nuisance (Abatement); and may, if necessary for that purpose, enter upon the land from which the nuisance proceeds.

Wigford v. *Gill* (1591) Cro. Eliz. 269.
Baten's Case (1610) 9 Co. Rep., at 55 a.

[It seems doubtful whether a person who has unsuccessfully attempted to obtain a mandatory order to destroy an alleged nuisance can afterwards abate it (*Lane* v. *Capsey* [1891] 3 Ch., at p. 416).]

Lord of manor

844. A commoner may not abate a nuisance to his common right caused by an act of the lord which is, *primâ facie*, lawful, but which is, in fact, an excessive exercise of the lord's rights. His remedy is by action.

Cooper v. *Marshall* (1757) 1 Burr. 259.
Sadgrove v. *Kirkby* (1795) 6 T. R. 483.
Arlett v. *Ellis* (1827) 7 B. & C. 346.

[*Quære*, if the rule applies to any other nuisance than interference with pasturage rights.]

Limits of remedy

845. A person abating a nuisance must do so peaceably, and without avoidable damage;[a] and he may not, to effect his object, infringe the rights of third parties.[b]

(a) *Lodie* v. *Arnold* (1697) 2 Salk. 458.
Perry v. *Fitzhowe* (1846) 8 Q. B. 757.
(b) *Roberts* v. *Rose* (1865) L. R. 1 Ex. 82.

Notice to abate

846. Where a nuisance arises from an omission, the party injured must, before proceeding to abate it, give notice to the wrong-doer of his intention to abate;[a] unless: —

(*a*) the nuisance is caused by the encroachment of the boughs or roots of a tree growing in the land of the wrong-doer;[b] or,

(*b*) it is necessary to abate immediately in order to secure life or property.[c]

(a) *Lonsdale* v. *Nelson* (1823) 2 B. & C., at p. 311, *per* Best, J.
Jones v. *Williams* (1843) 11 M. & W. 176.
(b) *Lemmon* v. *Webb* [1895] A. C. 1.
(c) *Lonsdale* v. *Nelson*, *ubi sup.*, at p. 311, *per* Best, J.
Jones v. *Williams*, *ubi sup.*, at p. 182, *per* Lord Abinger, C. B.

Notice unnecessary

847. Where a nuisance arises from an act, the injured party may abate it without notice,[a] unless: —

(*a*) it necessitates the demolition of a building which is inhabited;[b] or,

(*b*) it necessitates an entry on the land on which the nuisance arises, and such land is in the

occupation of a person who is not liable to an action, and the abatement is not urgently necessary.[c]

(a) *Davies* v. *Williams* (1851) 16 Q. B. 546.
(b) *Davies* v. *Williams, ubi sup.*
Lane v. *Capsey* [1891] 3 Ch., at p. 415.
(c) *Jones* v. *Williams* (1843) 11 M. & W., at p. 182.
Perry v. *Fitzhowe* (1846) 8 Q. B. 757.

Public nuisance

848. A person may not abate a public nuisance, unless he suffers such special damage from it as would entitle him to bring an action (*ante*, § 832 (*b*).)[a] But if the nuisance is caused by the obstruction of a public highway, a person who cannot otherwise conveniently exercise his right of passing along the highway may pass over [b] or remove [c] the obstruction; doing as little damage as possible.[d]

(a) *Mayor of Colchester* v. *Brooke* (1845) 7 Q. B. 339.
Winterbottom v. *Lord Derby* (1867) L. R. 2 Ex. 316.

[The latter was an unsuccessful action to recover the expenses of removing obstructions from the alleged obstructor. The question of the right to remove the obstructions was not directly discussed.]

(b) *Eastern Counties Co.* v. *Dorling* (1859) 28 L. J. C. P. 202.
(c) *Dimes* v. *Petley* (1850) 15 Q. B. 276.
Bagshaw v. *Buxton Board of Health* (1875) 1 Ch. D., at p. 224, *per* Jessel, M. R.
(d) *Campbell Davys* v. *Lloyd* [1901] 2 Ch. 518.

Injunction against nuisance

849. The Court will, in the exercise of its discretion, grant an injunction [a] or (if necessary) a

mandatory order [b] to restrain the continuance or compel the removal of a nuisance.

(a) *Imperial Gas Light & Coke Co.* v. *Broadbent* (1859) 7 H. L. C. 600.
Shelfer v. *City of London Electric Light Co.* [1895] 1 Ch. 287.
(b) *Daniel* v. *Ferguson* [1891] 2 Ch. 27.
Von Joel v. *Hornsey* [1895] 2 Ch. 774.

[For the general principles upon which the discretion of the Court is exercised in granting or withholding injunctions, see *ante*, Section I, Tit. VII, §§ 805–808.]

Apprehended nuisance

850. An injunction may also be granted to restrain the commission of an apprehended nuisance, on the principles explained in § 805.

Crowder v. *Tinkler* (1816) 19 Ves. 617.
Fleet v. *Metropolitan Asylums Board* (1886) II T. L. R. 361.

[Both approved in *A. G.* v. *Corporation of Manchester* [1893] 2 Ch., at p. 91; *A. G.* v. *Corporation of Nottingham* [1904] 1 Ch. 673.]

Addendum to Title III

It would be dangerous to attempt any exhaustive list of specific nuisances; for it is to be expected that, with changes in social and industrial habits, new examples will continually arise, and, possibly, old ones disappear from the list. But the following well-established instances may be mentioned:—

1. Emission of noxious smells.

Walter v. *Selfe* (1851) 4 De G. & Sm. 315 (brick-burning).
Margate Pier Co. v. *Margate Corpn.* (1869) 20 L. T. 564 (seaweed).
Rapier v. *London Tramways Co.* [1893] 2 Ch. 588 (stables).
A. G. v. *Tod-Heatley* [1897] 1 Ch. 560 (rubbish).

2. Production of unusual or excessive noise.

Soltau v. *De Held* (1851) 2 Sim. N. S. 133 (church bells).
Inchbald v. *Barrington* (1869) L. R. 4 Ch. 388 (circus).
Broder v. *Saillard* (1876) L. R. 2 Ch. D. 692 (stables).
Colwell v. *St. Pancras* [1904] 1 Ch. 707 (electric station).
Polsue v. *Rushmer* [1907] A. C. 121 (printing machines).

3. Knowingly harbouring or exposing cases of infectious disease or explosive or inflammable substances.

R. v. *Sutton* (1767), *per* Lord Ellenborough in *R.* v. *Vantandillo* (1815) 4 M. & S. 73 (inoculation for small-pox).
R. v. *Burnett* (1815) *ibid.*, 272 (do.).
Crowder v. *Tinkler* (1816) 19 Ves. 617 (storage of gunpowder).
Vaughan v. *Menlove* (1837) 3 Bing. N. C. 468 (storage of hay).
Hepburn v. *Lordan* (1865) 34 L. J. Ch. 293 (storage of jute).
Metropolitan Asylums Board v. *Hill* (1881) L. L. 6 App. Ca. 193 (hospital).

4. Causing crowds to assemble.

R. v. *Moore* (1832) 3 B. & Ad. 184 (pigeon shooting).
Walker v. *Brewster* (1867) L. R. 5 Eq. 25 (outdoor fête).
Bellamy v. *Wells* (1891) 39 W. R. 158 (boxing club).
Barber v. *Penley* [1893] 2 Ch. 447 (theatre).

[The obstruction must be permanent; the mere passing by of crowds on their way to a place of entertainment is not sufficient (*Inchbald* v. *Robinson* (1869) L. R. 4 Ch. App., at p. 396).]

5. Besetting or watching approaches to a house.

Lyons v. *Wilkins* [1899] 1 Ch., at p. 267 (*per* Lindley, M. R.).

[This form of nuisance must now be considered in connection with the Trades Disputes Act, 1906, s. 2; which practically abolishes it, if peacefully conducted, so far as industrial disputes are concerned.]

6. Fouling or substantially diminishing a (natural) water supply, or interfering with the right of lateral or vertical support of land in its original state.

Rowbotham v. *Wilson* (1857) 8 E. & B., at pp. 142, 151, 154, &c. (vertical and lateral support).
Bonomi v. *Backhouse* (1859) E. B. & E., at p. 654, *per curiam* (do.).
Swindon Waterworks Co. v. *Wilts &c. Canal Co.* (1875) L. R. 7 H. L. 704 (stream of water).
Ormerod v. *Todmorden Mill Co.* (1883) 11 Q. B. D. 155 (do.).
A. G. v. *Conduit Colliery Co.* [1895] 1 Q. B., at p. 312 (vertical support).
(Where it is said that no actual damage need be proved. *Sed quære.*)

[But the complainant's right of action is subject to the following considerations, viz.:

(i) Every riparian proprietor has a right to the reasonable user of the water flowing past his land, whether such user does or does not interfere with the enjoyment of a lower riparian proprietor;

Miner v. *Gilmour* (1858) 12 Moo. P. C., at p. 156, *per* Lord Kingsdown.

(ii) Every occupier of land has the right to take water percolating through his land in undefined channels, and to drain his land; even though the effect be to deprive adjacent occupiers of water or support.

Chasemore v. *Richards* (1859) 7 H. L. C. 349.
Popplewell v. *Hodgkinson* (1869) L. R. 4 Ex. 248.
Salt Union v. *Brunner Mond* [1906] 2 K. B. 822.
English v. *Met. Water Board* [1907] 1 K. B. 588.

[But the right to take percolating water does not cover (*a*) the right to foul it (*Ballard* v. *Tomlinson* (1885) 29 Ch. D. 115) or (*b*) the right to abstract silt from the defendant's soil in such a way that it will cause the plaintiff's land to subside (*Jordeson* v. *Sutton, &c. Gas Co.* [1899] 2 Ch. 217. *Semble*, in this case, the defendants took away silt from the *plaintiff's* soil).]

7. Substantial interference with the enjoyment of any easement, *profit à prendre*, or local right.

Dalton v. *Angus* (1881) L. R. 6 App. Ca. 740 (support of buildings).
G. E. Ry. v. *Goldsmid* (1884) L. R. 9 App. Ca. 927 (market).
Fitzgerald v. *Firbank* [1897] 2 Ch. 96 (fishery).
Brocklebank v. *Thompson* [1903] 2 Ch. 355 (local rights).
Colls v. *Home & Colonial Stores* [1904] A. C. 179 (lights).
Jolly v. *Kine* [1907] A. C. 1 (do.).
(Only a few cases are given; the rule is indisputable.)

8. Causing obstruction to, or danger to the use of, a highway or public bridge.

Barnes v. *Ward* (1850) 9 C. B. 392 (unfenced area).
Abbot v. *Macfie* (1863) 2 H. & C. 744 (cellar flap).
Hill v. *New River Co.* (1868) 9 B. & S. 303 (water spout).
Benjamin v. *Storr* (1874) L. R. 9 C. P. 400 (obstruction).
Tarry v. *Ashton* (1876) 1 Q. B. D. 314 (sign-board).
(But a highway may be dedicated to the public subject to what would otherwise be a nuisance (*Fisher* v. *Prowse* (1862) 2 B. & S. 770).)

[There is a curious rule that no action can be brought for a private nuisance caused by the alleged obstruction of a highway through mere non-feasance (*e. g.* omission to repair); unless it can be shown that a statutory liability to an action for the omission rests upon the defendant.

Russell v. *Men of Devon* (1788) 2 T. R. 667.
Cowley v. *Newmarket Local Board* [1892] A. C. 345.
Maguire v. *Liverpool Corporation* [1905] 1 K. B. 767.

Probably the liability of a person bound to repair *ratione tenurae* comes under the above rule. (*Rundle* v. *Hearle* [1898] 2 Q. B., at p. 89. And see also pp. 86 and 87.)]

9. Causing water to overflow on to the plaintiff's land.

Baten's Case (1611) 9 Co. Rep. 53 b. (eaves-drip).
Fletcher v. *Rylands* (1868) L. R. 3 H. L. C. 330 (flood water).
Snow v. *Whitehead* (1884) 27 Ch. D. 588 (rain water).

10. Allowing buildings or fences to fall into a dangerous condition.

Cheetham v. *Hampson* (1791) 4 T. R. 318 (where the only question was as to who was liable).
Todd v. *Flight* (1860) 9 C. B. N. S. 377.
Nelson v. *Liverpool Brewery Co.* (1877) L. R. 2 C. P. 311 (where also there was no doubt as to the liability of some one).

11. Maintenance of scandalous or riotous premises, or unlicensed entertainments.

R. v. *Williams* (1711) 1 Salk. 383.
R. v. *Rogier* (1823) 1 B. & C. 272.
R. v. *Charles* (1862) 9 Cox, C. C. 18.

12. Public display of acts of indecency or immorality, or of indecent literature.

R. v. *Holmes* (1853) 3 Car. & K. 360 (indecency).
The Queen v. *Harris* (1871) L. R. 1 C. C. R. 282 (immorality).
Steele v. *Brannan* (1872) L. R. 7 C. P. 261 (indecent literature).

[There are numerous other statutory nuisances which cannot be detailed. For a list, see Garrett, *Law of Nuisances* (3rd. edn.), pp. 288–372.]

TITLE IV—OTHER TORTS IN RESPECT OF LAND

Waste

851. An action will lie by a reversioner or remainderman against a tenant of the land in respect of waste,[a] or against a stranger in respect of damage to the inheritance.[b]

(a) *Bacon* v. *Smith* (1841) 1 Q. B. 345.
Woodhouse v. *Walker* (1880) 5 Q. B. D. 404.

[The rule was extended to copyhold estates by *Blackmore* v. *White* [1899] 1 Q. B. 293; which, however, treats it as an action on an implied contract.]

(b) *Baxter* v. *Taylor* (1832) 4 B. & Ad. 72.
Roberts v. *Holland* [1893] 1 Q. B. 665.
Mayfair Property Co. v. *Johnston* [1894] 1 Ch. 508, and cases therein cited.

[Such an action would not be an action of trespass, because the plaintiff's *possession* would not have been infringed. As to what constitutes waste, see *post*, Book III. Various other remedies are open to the reversioner or remainderman in respect of waste; but it is conceived that the ordinary action for damages would still lie (*Woodhouse* v. *Walker*, *ubi sup.*).]

Dangerous substances

852. A person who, for his own purposes, brings on land in his occupation, and collects and keeps there, anything likely to do mischief if it escapes, is *primâ facie* answerable for all damage to the land of another which is the consequence of its escape.[a] But he can excuse himself by showing that the escape

was due to the plaintiff's default,[b] or to the "act of God" (*vis major*)[c]

(a) *Tubervil* v. *Stamp* (1697) 1 Salk. 13.
Rylands v. *Fletcher* (1868) L. R. 3 H. L. 330 (water).
Crowhurst v. *Amersham Burial Board* (1878) 4 Ex. D. 5.
Smith v. *Giddy* [1904] 2 K. B. 448 (boughs of trees).
(In the report of this case it is not stated that the defendants had planted the trees. But, if it were not so, the decision would be inconsistent with principle, and with the decision of another Divisional Court in *Giles* v. *Walker* (1890) 24 Q. B. D. 656.)

(b) *Eastern, &c. Co.* v. *Cape Town Tramways* [1902] A. C. 381.
(c) *Nichols* v. *Marsland* (1876) 2 Ex. D. 1.

[The rule is not confined to cases of damage to land; but these are the most numerous. And there might be some cases which would not, strictly, come under the head of Nuisance.]

Slander of title

853. An action for damages and an injunction[a] lies against a person who maliciously and falsely denies,[b] by words or writing,[c] the existence or soundness of the plaintiff's title to property in land, whereby the plaintiff suffers actual damage;[d] and such action will survive to the representatives of the party injured, in so far as damage can be proved to have been caused to his estate.[e] Proof that the defendant honestly believed himself to be acting in the exercise of his own right or duty, is inconsistent with the existence of malice in him.[f]

(a) *Leslie* v. *Cave* (1888) II T. L. R. 584; affd. on appeal, VIII T. L. R. 5.
(b) *Gerard* v. *Dickenson* (1590) 4 Co. Rep. 18 a.
(c) *Gerard* v. *Dickenson, ubi sup.*
Malachy v. *Soper* (1836) 3 Bing. N. C., at p. 384, *per* Tindal, C. J.
(d) *Hargrave* v. *Le Breton* (1769) 4 Burr. 2422.
Ravenhill v. *Upcott* (1869) 20 L. T. 233.
(e) *Hatchard* v. *Mège* (1887) 18 Q. B. D. 771.
(f) *Pitt* v. *Donovan* (1813) 1 M. & S. 639.
Pater v. *Baker* (1847) 3 C. B. 831.

SECTION III

TORTS IN RESPECT OF CHATTELS PERSONAL

TITLE I — TRESPASS TO GOODS

854. Trespass to goods is any direct[a] infringement of the possession by another of corporeal personal chattels by means of an asportation[b] or other physical invasion;[c] whether such infringement is or is not intentional.[d] *Definition*

(a) *Hartley* v. *Moxham* (1842) 3 Q. B. 701.
Sharrod v. *L. & N. W. Ry. Co.* (1849) 4 Exch. 580.
(b) *Bushell* v. *Miller* (1718) 1 Stra. 128.
Fouldes v. *Willoughby* (1841) 8 M. & W. 540.
Burroughes v. *Bayne* (1860) 5 H. & N., at p. 301.
Kirk v. *Gregory* (1876) 1 Ex. D. 55.

[The technical name for the old writ in this case was Trespass *de bonis asportatis*.]

(c) *Wright* v. *Ramscot* (1667) 1 Wms. Saund. 82.
Dand v. *Sexton* (1789) 3 T. R. 37.
(d) *Leame* v. *Bray* (1803) 3 East, 593.
Covell v. *Laming* (1808) 1 Camp. 497.

[But where the alleged injury, though consequent upon the defendant's conduct, was caused by forces over which he had no control, and was not the result of his negligence, there is no act on his part, and, consequently, no liability. (*Gibbons* v. *Pepper* (1694) 4 Mod. 405; *Stanley* v. *Powell* [1891] 1 Q. B. 86.) See *ante*, § 727.]

855. Subject to the exceptions mentioned in §§ 858, 859, 860, and 862 (*post*), the plaintiff, in an action for *Action by possessor*

trespass to goods, must prove that he had actual possession of the goods at the time when the defendant interfered with them.

Smith v. *Milles* (1786) 1 T. R. 475.
Young v. *Hichens* (1844) 6 Q. B. 606.
Davis v. *Danks* (1849) 3 Exch. 435.
Brierly v. *Kendall* (1852) 17 Q. B. 937.

[A person whose goods have been distrained for rent is deemed to be still in possession of them for the purposes of the action of trespass (*Whitby* v. *Roberts* (1825) McCle. & Yo., at p. 118, *per* Hullock, B.]

Custody of servant

856. Goods left by a master in the custody of a servant remain in the possession of the master, who alone can bring Trespass in respect of them;[a] and the servant is himself guilty of trespass if he does anything with the goods inconsistent with the master's possession.[b] But goods handed to a servant on behalf of his master by a third person, are in the possession of the servant; until they have been definitely appropriated by him to his master's use.[c]

(a) *R.* v. *Wilkins* (1789) 1 Leach, 520.
Hopkinson v. *Gibson* (1805) 2 Smith, at p. 204, *per* Lord Ellenborough, C. J.
(b) *Bloss* v. *Holman* (1586) Owen, 52.
(c) *R.* v. *Waite* (1743) 1 Leach, 28.
R. v. *Reed* (1854) 1 Dears. 257. (It was to meet this difficulty that the statutory offence of "embezzlement" was introduced. And see Larceny Act, 1901.)

[As to who is a servant for this purpose, see *Moore* v. *Robinson* (1831) 2 B. & Ad. 817.]

857. A bailor of goods cannot bring Trespass against his bailee;[a] unless the bailee determines the bailment by breaking bulk.[b] *Bailor and bailee*

(a) *R* v. *Smith* (1836) 1 M. C. C. 473.
R. v. *Goodbody* (1838) 8 C. & P. 665.
R. v. *Cole* (1847) 2 Cox, C. C. 340.
R. v. *Hey* (1849) T. & M. 209.
(b) Y. B. 13 Edw. IV (1473) fo. 9, pl. 5, *per* Brian, C. J.
R. v. *Cornish* (1854) Dears. 425.

[For purposes of the criminal law, a bailee who originally obtained possession by deceit, intending at the time to misappropriate, is deemed guilty of larceny (*R.* v. *Pear* (1779) 1 Leach, 212; *R.* v. *Campbell* (1827) 1 M. C. C. 179; *R.* v. *Thompson* (1862) L. & C. 225; *R.* v. *Hands* (1887) 16 Cox, C. C. 189). *Quære:* Would he be guilty of civil trespass? It was to meet the difficulty stated in the text, that the statutory criminal offence of "larceny by a bailee" was introduced; for where the original taking was lawful or excusable there trespass did not lie. (*Cooper* v. *Chitty* (1756) 1 Burr. 20; *Smith* v. *Milles* (1786) 1 T. R. 475; *R.* v. *Middleton* (1873) L. R., 2 C. C. R. 55. And see Larceny Act, 1901.]

858. A bailor of goods has sufficient possession to support an action for trespass against third persons;[a] unless an exclusive possession of the goods for a period not yet expired has been granted by him to the bailee.[b] *Bailor and strangers*

(a) *Lotan* v. *Cross* (1810) 2 Camp. 464.
White v. *Morris* (1852) 11 C. B. 1015.
Johnson v. *Deprose* [1893] 1 Q. B., at p. 515.
(b) *Ward* v. *Macauley* (1791) 4 T. R. 409.
Gordon v. *Harper* (1796) 7 T. R. 9.

[The fact that the bailor can sue does not, of course, deprive the bailee of his obvious right to bring the action.]

Trustee

859. A trustee of goods can maintain the action of trespass in respect of them against third parties; though the *cestui que trust* is in occupation of them.

White v. *Morris* (1852) 11 C. B. 1015.

[Where goods have been assigned by way of mortgage, upon trust to permit the assignor to hold the goods until default, the assignee may maintain trespass against a third party before default; for the mere holding of the assignor is consistent with the assignee's legal possession (*White* v. *Morris*, *ubi sup.*) But if the assignment contains a legal proviso (expressed or implied) that the assignor shall retain possession until default, the assignee cannot sue in trespass until default is made (*Wheeler* v. *Montefiore* (1841) 2 Q. B. 133; *Bradley* v. *Copley* (1845) 1 C. B. 685; *Barker* v. *Furlong* [1891] 2 Ch., at pp. 179, 180). Apparently, therefore, when the assignment is a bill of sale under the Act of 1882, the assignee cannot sue in trespass before the happening of default, or other circumstance mentioned in s. 7 of that Act, entitling him to take possession.]

Personal representative

860. An executor or administrator can bring trespass for an injury committed to the goods of the deceased after the latter's death but before the grant of probate or letters of administration.

Tharpe v. *Stallwood* (1843) 5 M. & G. 760.
Kirk v. *Gregory* (1876) 1 Ex. D. 55.

[The right of the personal representative to bring actions for trespasses committed during the lifetime of the deceased stands on a different footing, and is dealt with in Section I, Tit. VI, § 786, *ante*.]

Sheriff

861. A sheriff who has seized goods in execution of a writ of *fi. fa.* may bring Trespass against any one who interferes with them.

Wilbraham v. *Snow* (1670) 2 Wms. Saund. 47.

[The common law remedy of a distrainor, if the goods seized by him have been wrongfully interfered with, is by the actions of Rescous or of Pound-breach, according to the circumstances. In the case of a distraint for rent, the distrainor has also the special remedy of an action on the 2 W. & M., st. i, c. 5, s. 4. The goods being in the custody of the law, the distrainor could not bring trespass (*R.* v. *Cotton* (1751) Parker, 101; *Whitby* v. *Roberts* (1825) McCle. & Yo. 107).]

Owner of franchise

862. The owner of a franchise which entitles him to goods (*e. g.*, estray or wreck), can bring Trespass in respect of interference with the goods before he has actually seized them.

Mowbray v. *Odrich* (1333) 2 Wils. 24.
Bailiffs of Dunwich v. *Sterry* (1831) 1 B. & Ad. 831.

[The last case has sometimes been cited in support of the wider proposition: that a right to possession always carries the right to bring Trespass. But see the Irish case of *R.* v. *Clinton* (1869) 4 Ir. R. (C. L.) 6.]

Finder

863. The possession of a mere finder,[a] and even of a wrong-doer,[b] though only intended to be temporary,[c] is sufficient to support an action of Trespass against a person without title; and the latter cannot set up a *jus tertii* as a defence, unless he can prove that he acted under it.[d]

(a) *Armorie* v. *Delamirie* (1722) 1 Stra. 505.
Bridges v. *Hawksworth* (1851) 21 L. J. Q. B. 75.

[These were cases of Trover; but the argument for Trespass is much stronger. It is clear that the title of a finder — *a fortiori* that of a mere wrong-doer — cannot be made the basis of an action

of Trespass against the owner of the goods, who has a right to take them (*Blades* v. *Higgs* (1865) 20 C. B. N. S. 214).]

(b) *Woodson* v. *Nawton* (1727) 2 Stra. 777.
(c) *Colwill* v. *Reeves* (1811) 2 Campb. 575.
Moore v. *Robinson* (1831) 2 B. & Ad. 817.
The Winkfield [1902] P. 42.
(d) *Jeffries* v. *G. W. R. Co.* (1856) 5 E. & B., at p. 806.

Receiver

864. A person who receives goods from a trespasser does not thereby become guilty of trespass; unless he was a participant in the original taking.

Y. B. 21 Edw. IV (1481) fo. 74, pl. 6, *per* Brian, C. J.
Day v. *Austin* (1595) Owen, 70.
Badkin v. *Powell* (1776) 2 Cowp. 476.

[It was to meet this point that the statutory offence of "receiving stolen goods" was introduced. The recipient is, of course, guilty of Conversion (*post*, § 868).]

Loss of goods

865. Where the plaintiff in an action of Trespass has been deprived of his goods, the measure of damages is *primâ facie* the value of the goods;[a] but if, as between the parties, the defendant has an interest in the goods, the measure of damages is limited to the value of the plaintiff's interest.[b]

(a) *Heydon's & Smith's Case* (1611) 13 Co. Rep., at p. 69.
Sowell v. *Champion* (1837) 6 A. & E. 407.
The Winkfield [1902] P. 42.
(b) *Brierley* v. *Kendall* (1852) 17 Q. B. 937.
Toms v. *Wilson* (1863) 32 L. J. Q. B. 382.

[By the Civil Procedure Act, 1833, s. 29, in all actions of Trespass *de bonis asportatis*, the jury may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of seizure.]

866. In all other cases of trespass to goods, the measure of damages is the loss actually suffered by the plaintiff as the "natural and probable" consequence of the defendant's act.[a] But if the trespass was accompanied by circumstances of insult or contumely, the Court will not scrutinize too closely the verdict of the jury.[b] *Measure of damages*

(a) *Thompson* v. *Pettitt* (1847) 10 Q. B. 101. (In this case the plaintiff recovered far more than the value of the goods.)
Gilbertson v. *Richardson* (1848) 5 C. B. 502.
Keene v. *Dilke* (1849) 4 Exch. 388.
Moore v. *Drinkwater* (1858) 1 F. & F. 134.
(b) *Brewer* v. *Dew* (1843) 11 M. & W. 625.
Doss v. *Doss* (1866) 14 L. T. N. S. 646 (P. C.).

867. As an alternative remedy, the party whose goods are wrongfully seized may bring the action of Replevin for the recovery of the goods themselves;[a] but if he adopts this remedy, his right to bring the action of Trespass is barred.[b] *Replevin*

(a) *Shannon* v. *Shannon* (1804) 1 Sch. & Lep. 324.
George v. *Chambers* (1843) 11 M. & W. 149.
Mennie v. *Blake* (1856) 6 E. & B. 842.
(b) *Gibbs* v. *Cruikshank* (1873) L. R. 8 C. P. 454.

[In ordinary practice Replevin is confined to cases of wrongful distress.]

TITLE II — CONVERSION OF GOODS

Definition

868. The unjustifiable exercise of an act of ownership over specific goods,[a] of which another person has a right to the possession,[b] constitutes the tort of Conversion; and the person whose right is thus infringed is entitled to recover the value of the goods in an action of Trover.[c]

(a) *Higgs* v. *Holiday* (1600) Cro. Eliz. 746.
Orton v. *Butler* (1822) 5 B. & Ald. 652.
Moss v. *Hancock* [1899] 2 Q. B. 111. (This was not a case of Conversion; but the arguments employed would apply.)

[A bank note is specific goods for the purposes of this § (*Miller* v. *Race* (1758) 1 Burr. 452).]

(b) *Wilbraham* v. *Snow* (1670) 2 Wms. Saund. 47 (and notes thereto).
Biddulph v. *Ather* (1755) 2 Wils. 23.
Gordon v. *Harper* (1796) 7 T. R. 9.

[The "right to possession" which is necessary to found an action of Trover is often described as a "special property" in the goods. This is a most unfortunate expression; for in one of the best known cases it is expressly laid down that the term "special property" includes interests which do not carry the right to possession, and which, therefore, are not sufficient to found actions of Trover. (See *Webb* v. *Lawrence* (1797) 7 T. R., at p. 398, *per* Lawrence, J.) On the other hand, a person whose goods have been distrained for rent can sue a third party in Trover (*Turner* v. *Ford* (1846) 15 M. & W. 212).]

(c) *Cooper* v. *Chitty* (1756) 1 Burr. 20.
Henderson v. *Williams* [1895] 1 Q. B. 251.
Rhodes v. *Moules* [1895] 1 Ch. 236.
(It would seem that if, *as between plaintiff and defendant*, the defendant's act has not deprived the plaintiff of the full value of the goods, the measure of damages is the loss actually suffered by the plaintiff (*Chinery* v. *Viall* (1860) 5 H. & N. 288). This case shows incidentally that a bailee may even maintain Trover against his bailor who has improperly deprived him of pos-

session. (See also *Roberts* v. *Wyatt* (1810) 2 Taunt. 268.) By the Civil Procedure Act, 1833, s. 29, the jury may in all cases of Trover give damages in the nature of interest over and above the value of the goods.)

[The action of Trover acquired its name from the original style of declaration, which alleged that the plaintiff was lawfully possessed of certain goods as of his own property, and casually lost the said goods, and that the same came to the defendant's hands by finding (*trouver*). This averment of loss and finding ultimately became fictitious, and could not be disputed; but the name survived, not only for this action, but for the cognate action of Detinue (*post*, Tit. III. And see *Cooper* v. *Chitty* (1756) 1 Burr. 20). Since the abolition of the necessity for this averment by the Common Law Procedure Act, 1852, s. 49, the term "trover" has tended to be superseded by the term "conversion." See *Burroughes* v. *Bayne* (1860) 5 H. & N., at p. 301, *per* Martin, B.]

Defendant's title

869. It is immaterial for the purposes of Trover whether the defendant acquired possession of the goods lawfully or unlawfully.

Cooper v. *Chitty* (1756) 1. Burr., at p. 31. (If the defendant's original taking was unlawful, the plaintiff who adopts this form of action is said to "waive the trespass." If the original taking was lawful, the plaintiff is required to prove a formal demand of possession and a refusal; unless there is other distinct evidence of conversion (*Bruen* v. *Roe* (1667) Sid. 264; *Roberts* v. *Wyatt* (1810) 2 Taunt. 268; *Lovell* v. *Martin* (1813) 4 Taunt., at p. 801; Chitty, *Pleading* (6th ed.) I, p. 167).

What amounts to conversion

870. An "act of ownership," for the purposes of § 868, means some physical act asserting the claim of the defendant to deal with the goods in a manner inconsistent with the rights of the plaintiff.

National Bank v. *Rymill* (1881) 44 L. T. 767.

Turner v. *Hockey* (1887) 56 L. J. Q. B. 301. (See this case explained by Collins, J., in *Consolidated Co.* v. *Curtis* [1892] 1 Q. B., at p. 502.)

Barker v. *Furlong* [1891] 2 Ch., at p. 181.

In particular, it includes: —

(i) the unauthorised user, or consumption of the goods;

Mulgrave v. *Ogden* (1591) Cro. Eliz. 219.
Richardson v. *Atkinson* (1723) 1 Str. 576.
Philpott v. *Kelley* (1835) 3 A. & E. 106.
Gurr v. *Cuthbert* (1843) 12 L. J. Exch. 309.

(ii) the destruction (but not the mere damaging) of the goods;

Simmons v. *Lillystone* (1853) 8 Exch. 431.

(iii) the delivery of the goods to a third person with intent to pass the ownership,[a] or even the possession;[b]

(a) *Penn* v. *Bittleston* (1851) 7 Exch. 152.
Hollins v. *Fowler* (1875) L. R. 7 H. L. 757.
Hiort v. *L. & N. W. Ry. Co.* (1879) 4 Ex. D. 188.

(b) *Syeds* v. *Hay* (1791) 4 T. R. 260.
Devereux v. *Barclay* (1819) 2 B. & Ald. 702.
Stephenson v. *Hart* (1828) 4 Bing. 476.
Wyld v. *Pickford* (1841) 8 M. & W. 443.

(iv) the unwarranted pledging or charging of the goods;

Fuentes v. *Montis* (1868) L. R. 3 C. P. 268.
Mulliner v. *Florence* (1878) L. R. 3 Q. B. D. 484.

[A lienor is guilty of conversion if he pledges the goods on which he has a lien; a pledgee is not. (*McCombie* v. *Davies* (1805) 7 East, 5; *Gurr* v. *Cuthbert* (1843) 12 L. J. Q. B. 309; *Dinald* v. *Suckling* (1866) L. R. 1 Q. B. 585.)]

(v) the collection of a cheque or bill by a banker on behalf of a person who has no title, under circumstances not justified by the Bills of Exchange Acts, 1882 and 1906.

Arnold v. *Cheque Bank* (1876) 1 C. P. D. 579.
Fine Art Society v. *Union Bank* (1886) 17 Q. B. D. 705.
Kleinwort Sons & Co. Comptoir National [1894] 1 Q. B. 157.
Macbeth v. *N. & S. W. Bank* [1908] 1 K. B. 13.

But a mere bargain and sale, by which property is incapable of passing,[a] or a mere handling or moving without reference to the ownership,[b] does not amount to conversion.

(a) *Lancashire Wagon Co.* v. *Fitzhugh* (1861) 6 H. & N. 502.
Consolidated Co. v. *Curtis* [1892] 1 Q. B., at p. 498.
(b) *Fouldes* v. *Willoughby* (1841) 8 M. & W. 540.
Fowler v. *Hollins* (1872) L. R. 7 Q. B., at p. 629.
England v. *Cowley* (1873) L. R. 8 Exch. 126.

Relation back

871. A title which relates back to the date of the conversion is sufficient to maintain Trover.

Balme v. *Hutton* (1833) 9 Bing. 471.
Rigg. v. *E. of Lonsdale* (1857) 1 H. & N. 923.
Goodman v. *Boycott* (1862) 2 B. & S. 1 (approved in *Blades* v. *Higgs* (1865) 20 C. B. N. S. 214).
Bristol Bank v. *M. R. Co.* [1891] 2 Q. B. 653.
(But *Goodman* v. *Boycott* was an action of Detinue.)

[*Quære:* Whether the right extends to cases in which the plaintiff's title, acquired after the conversion, does not relate back.]

Bailors and bailee

872. Where there has been a bailment which the bailor may put an end to at his pleasure, either the bailor or the bailee may sue a third party in Trover.

Burton v. *Hughes* (1824) 2 Bing. 173.
Nicholls v. *Bastard* (1835) 2 C. M. & R. 659.
Manders v. *Williams* (1849) 4 Exch. 588.
The Winkfield [1902] P., at p. 56.

Finders

873. The finder of a chattel may maintain Trover against a mere wrong-doer;[a] but he is liable to the owner if he refuses to give up the chattel on demand.[b]

(a) *Armorie* v. *Delamirie* (1722) 1 Str. 505.
(b) *Bridges* v. *Hawksworth* (1851) 21 L. J. Q. B. 75.

Mere wrong-doers

874. A mere wrong-doer whose possession has been divested cannot maintain Trover.

Buckley v. *Gross* (1863) 3 B. & S. 566.

Co-owners and Trover

875. One co-owner of a chattel cannot bring Trover against another co-owner for any act which falls short of an actual destruction of the chattel, or of a user wholly inconsistent with the continuance of the common interest.[a] An ordinary sale, even though it professes to pass the whole interest in the chattel, is not such an act;[b] but a sale in market overt may be.[c]

(a) *Mayhew* v. *Herrick* (1849) 7 C. B. 229.
Jacobs v. *Seward* (1872) L. R. 5 H. L. 464.
Nyberg v. *Handelaar* [1892] 2 Q. B., at p. 204, *per* Lopes, L. J.
(b) *Farrar* v. *Beswick* (1836) 1 M. & W. 682.
(c) *Farrar* v. *Beswick*, *ubi sup.*, at p. 688. (Because it will probably give the purchaser a good title against the co-owner.)

[For the rights of co-owners against strangers, see *ante*, Sect. I, Tit. III, § 765.]

Bona fides no defence

876. It is immaterial for the purposes of Trover that the defendant acted *bonâ fide*, and in ignorance of the plaintiff's rights;[a] but a *bonâ fide* defendant who has dealt with a person whom he believes to be the owner of the goods, or to be acting under the authority of the owner, will not be liable for conversion

if he acted only in a manner which would have been justifiable if it had been the act of such person.[b]

(a) *Hollins* v. *Fowler* (1875) L. R. 7 H. L. 757.
Consolidated Co. v. *Curtis* [1892] 1 Q. B. 495.
Mansell v. *Valley Printing Co.* [1908] 1 Ch. 567.
(b) *Heald* v. *Carey* (1852) 11 C. B. 977.
Hollins v. *Fowler, ubi sup.*, at p. 767.

Demand and refusal

877. The defendant's refusal to deliver up the goods is not in itself a conversion;[a] but it is *primâ facie* evidence of a conversion, which may be rebutted by the defendant showing that his refusal did not involve any claim of ownership.[b]

(a) *Isaack* v. *Clarke* (1615) 2 Bulst. 306.
Mires v. *Solebay* (1677) 2 Mod. 242.
(b) *Alexander* v. *Southey* (1821) 5 B. & Ald. 247.
Verrall v. *Robinson* (1835) 2 C. M. & R. 495.
Vaughan v. *Watt* (1840) 6 M. & W. 492.
Acraman v. *Cooper* (1842) 10 M. & W., at p. 593.
Rushworth v. *Taylor* (1842) 3 Q. B. 699.

[A plaintiff in Trover who relies on demand and refusal must prove either (1) that the defendant has it in his power to give up the goods,[a] or (2) has represented that he has such power,[b] or (3) that he has disabled himself by his own wrong from giving up the goods.[c]

(a) *Smith* v. *Young* (1808) 1 Camp. 439; *Verrall* v. *Robinson, ubi sup.*; *Heald* v. *Carey* (1852) 11 C. B. 977.
(b) *Seaton* v. *Lafone* (1887) 19 Q. B. D. 68.
(c) *Bristol Bank* v. *M. R. Co.* [1891] 2 Q. B., at pp. 663–664.]

Purchaser of goods

878. Subject to the rules affecting negotiable instruments and coin of the realm,[a] the *bonâ fide* purchaser or pledgee of goods which the vendor or pledgor had no right to sell or pledge is guilty of conversion,

if he deals with them in a manner inconsistent with the title of the owner; [b] except in the case of a sale of goods in market overt,[c] or other cases in which such a sale or pledge is, though unlawful, binding on the owner.[d]

(a) Bills of Exchange Act, 1882, s. 38 (3); *Miller* v. *Race* (1758) 1 Burr. 452; *Moss* v. *Hancock* [1899] 2 Q. B. 111.

(b) *Cooper* v. *Willomatt* (1845) 1 C. B. 672.
Fuentes v. *Montis* (1868) L. R. 3 C. P. 268.
Singer Manfg. Co. v. *Clark* (1879) 5 Ex. D. 37.
Oppenheimer v. *Frazer* [1907] 2 K. B. 50.

[The rule applies even where the purchase was made by the defendant's agent without express authority; if the purchase was afterwards ratified by the defendant (*Hilbery* v. *Hatton* (1864) 2 H. & C. 822).]

(c) Sale of Goods Act, 1893, s. 22. (But even in this case the purchaser may have to restore the goods to the owner, if the title has passed through a thief, and the goods are still in the purchaser's possession (*ibid.* s. 24; Larceny Act, 1861, s. 100). The purchaser in market overt incurs, however, no personal liability, and cannot be sued in Trover if he has parted with the goods before the conviction of the thief (*Horwood* v. *Smith* (1788) 2 T. R. 750).]

(d) Sale of Goods Act, 1893, ss. 21, 23, 25.

Liability of bailee

879. A bailee is not liable in Trover if the goods are lost or stolen without his connivance whilst they are in his possession.[a] The bailor's remedy against him, if any, is an action on the contract of bailment.[b]

(a) *Owen* v. *Lewyn* (1672) 1 Ventr. 223, *per* Hale, C. J.
Ross v. *Johnson* (1772) 3 Burr. 2825.
Williams v. *Gesse* (1837) 3 Bing. N. C.

(b) *Ross* v. *Johnson*, *ubi sup.* (For the contractual liabilities of the various classes of bailees, see Book II, Part II, *sub titt.* "Hire," "Loan of Goods," "Deposit," "Carriage.")

Jus tertii

880. A mere wrong-doer may not set up a *jus tertii* as a defence in an action of Trover, at any rate

as against a person who has been in possession;[a] nor may a bailee set up such a defence in an action by his bailor.[b] But in other cases the defendant in an action of Trover may set up a *jus tertii;* even though he does not claim to be acting under it.[c]

(a) *Webb* v. *Fox* (1797) 7 T. R. 391.
Northam v. *Bowden* (1855) 11 Exch. 70.
Jefferies v. *G. W. R. Co.* (1856) 5 E. & B. 802.
Bourne v. *Fosbrooke* (1865) 18 C. B. N. S. 515.
(b) *Stonard* v. *Dunkin* (1809) 2 Camp. 344.
Gosling v. *Birnie* (1831) 7 Bing. 339.
Crosskey v. *Mills* (1834) 1 C. M. & R. 298.
(c) *Elliott* v. *Kemp* (1840) 7 M. & W. 306.
Leake v. *Loveday* (1842) 4 M. & G. 972.
Gadsden v. *Barrow* (1854) 9 Exch. 514.

Effect of judgment

881. A judgment in Trover for the full value of the goods, followed by satisfaction, vests the property in the goods in the defendant as against the plaintiff, as from the date of the conversion.

Morris v. *Robinson* (1824) 3 B. & C., at p. 206.
Cooper v. *Shepherd* (1846) 3 C. B. 266.
Buckland v. *Johnson* (1854) 15 C. B. 145. (This case appears to decide that judgment in Trover vests the property in the defendant, even without satisfaction. But this extension of the doctrine was expressly repudiated by the same Court in *Brinsmead* v. *Harrison* (1871) L. R. 6 C. P. 584; *ibid.* 7 C. P. 547.)

[It must be remembered that a plaintiff in Trover is now entitled to specific recovery of the goods, if they are in the possession of the defendant. (See *ante*, Sect. 1, Tit. VII, § 810.)]

TITLE III—DETINUE

Definition

882. Any person who, being in possession of the goods of another, unlawfully refuses to give them up on demand, is liable to an action of Detinue, in which he is ordered to restore the goods or pay the value thereof, and to pay damages for the unlawful detention.[a] In this action, the refusal to give up constitutes the offence, and is not merely evidence of it.[b]

(a) *Clements* v. *Flight* (1846) 16 M. & W. 42.
Eberle's Hotels v. *Jonas* (1887) 18 Q. B. D., at p. 466, *per* Lord Esher, M. R.

(b) *Isaack* v. *Clark* (1615) 2 Bulst., at p. 308.
Gledstane v. *Hewitt* (1831) 1 Cr. & J. 565. (One consequence of this rule is: that the period of limitation only begins to run against the plaintiff from the date of his (first) demand against the defendant and the latter's refusal (*Wilkinson* v. *Verity* (1871) L. R. 6 C. P. 206; *Miller* v. *Dell* [1891] 1 Q. B. 468).)

[The nature of the action of Detinue has often been the subject of discussion by the Courts (Cf. *Isaack* v. *Clark*, *ubi sup.*; *Gledstane* v. *Hewitt*, *ubi sup.*; *Walker* v. *Needham* (1841) 3 M. & G. 557; and *Bryant* v. *Herbert* (1878) 3 C. P. D. 389). And even Parliament itself has, at different times, taken different views on the subject. (Cf. Common Law Procedure Act, 1852, Sched. B (29), and County Courts Act, 1850, s. 11.) But the truth appears to be, that Detinue was a variety of the ancient action of Debt, which was itself originally in the nature of a real action, to recover specific chattels, but, owing partly to historical, partly to economic, causes, came early to be treated as a personal action, generally founded on contract. As a natural consequence of this origin, various anomalies attached to it; one being that, until 1833, a claim in Detinue could generally be met by the primitive defence known as "wager of law," a defence not available against the action of Trespass, or the more modern actions founded on the Statute of Westminster the Second ("Case"). Hence Detinue tended at one time to be superseded

by Trover (*ante*, Title II), which, in many cases, is equally applicable to the facts. But after the defence of "wager of law" had been abolished by s. 13 of the Civil Procedure Act, 1833, there was a revival of Detinue, and, naturally, with some misunderstanding as to its nature. The action is, in fact, useful in cases in which the defendant sets up no claim of ownership, and has not been guilty of trespass; for, on the latter point especially, it is clear that it was never necessary in Detinue to allege that the defendant's original acquisition was unlawful. The typical case was that in which a bailor sued his bailee to recover the goods bailed (*detinue sur bailment*), there being then no action founded on simple contract; and this long remained the formal assumption in every action of Detinue; though at an early date the allegation of bailment became a mere matter of form, which could not be denied or "traversed." (See *Gledstane* v. *Hewitt*, *ubi sup.*) But allegations of finding, and even of trespass, were also admitted (*detinue sur trover*, &c.); and thus, as was natural, the plea of "not guilty" was recognised, in addition to the more correct plea of "non detinet." With regard to the latter, a good deal of doubt existed at one time as to whether it must be understood merely as a denial of the fact of detention, or as including a denial of the plaintiff's title. The Common Law Rules of Pleading issued in 1834, under s. 1 of the Civil Procedure Act, 1833, adopted the former view; after which it became necessary for the defendant, if he wished to set up a title adverse to the plaintiff, to plead specially (*Richards* v. *Frankum* (1840) 6 M. & W. 420; *Mason* v. *Farnell* (1844) 12 M. & W. 674). And this distinction is, in effect, maintained by the existing rules of practice. (See R. S. C. 1883, App. D, Sect. VI.) The action of Detinue is now, apparently, treated as an action of Tort (*Trotter* v. *Windham & Co.* (1907) XXIII T. L. R. 676); but it may be regarded as doubtful whether a claim for the return of specific goods (*Du Pasquier* v. *Cadbury* [1903] 1 K. B. 104) or a claim really arising out of contract (*Re Button* [1907] 2 K. B. 180) *e. g.* bailment, would be treated as a claim in Tort merely because it was framed in Detinue.]

883. The expression "goods of another" in § 882 means goods in which the plaintiff has sufficient interest to entitle him to possession. *Plaintiff's title*

Mason v. *Farnell* (1844) 12 M. & W., at p. 684.
Nyberg v. *Handelaar* [1892] 2 Q. B. 202.

Finders

884. Subject to § 885, the finder of a chattel has a sufficient interest to entitle him to possession.

Armorie v. *Delamirie* (1722) 1 Str. 505.

Occupier of land

885. Subject to § 886, the possessor of land to which the public have not access has sufficient interest to entitle him to possession of chattels found on the land.[a] But, as between persons having different interests in the land, the right to possession depends on the nature of the interests, and the circumstances in which the chattels are found.[b]

(a) *South Staffordshire Water Co.* v. *Sharman* [1896] 2 Q. B. 44.
(b) *Elwes* v. *The Brigg Gas Co.* (1886) 33 Ch. D. 562.

Chattels on land to which the public have access

886. When a chattel is found in a place to which the public have access, the finder is entitled to the possession of the chattel against every one but the owner thereof.

Bridges v. *Hawkesworth* (1851) 21 L. J. Q. B. 75.

[This was an action of Trover; but the language of the Court covers Detinue. In this case the goods were found on the floor of a shop which the finder had entered as a customer. *Quære:* if the finder had been a mere trespasser.]

Parting with possession

887. The fact that the defendant has, before the demand by the plaintiff, improperly parted with the

property or possession in or of the goods, to a third person, is no defence to the action.

Jones v. *Dowle* (1841) 9 M. & W. 652.
Bristol Bank v. *M. R. Co.* [1891] 2 Q. B. 653.

[The last case also set at rest a doubt which had existed since the decision in *Goodman* v. *Boycott* (1861) 2 B. & S. 1; and decided that it was no defence that the plaintiff's title had accrued since the defendant had parted with the chattel.]

Jus tertii

888. The defendant in an action of Detinue cannot, as against his own bailor, set up a *jus tertii;* [a] unless he claims to act under it,[b] or unless the title of the bailor to the goods has expired since the bailment.[c]

(a) *Betteley* v. *Read* (1843) 4 Q. B., at p. 517.
Rogers v. *Lambert* [1891] 1 Q. B. 318.
(b) *Biddle* v. *Bond* (1865) 6 B. & S. 225.
(c) *Thorne* v. *Tilbury* (1858) 3 H. & N. 534; quoted in *Rogers* v. *Lambert, ubi sup.* (But *Thorne* v. *Tilbury* was an action of Trover.)

Effect of judgment

889. A judgment in Detinue for the value of the goods, followed by satisfaction, vests the property in the goods in the defendant, as against the plaintiff.

Brinsmead v. *Harrison* (1871) 6 C. P. 584.
Ex parte Drake (1877) 5 Ch. D. 866.

[The Court may now order the defendant to deliver up the goods instead of allowing him to exercise his former option of paying the value; and, if he refuses, may attach him for disobedience. (R. S. C. 1883, O. XLVIII. r. 1.)]

TITLE IV—OTHER TORTS IN RESPECT OF CHATTELS PERSONAL

Action by reversioner

890. The owner of goods the possession of which is vested in another person for a definite period may bring an action against a stranger, in respect of any permanent injury to his reversionary interest in the goods, caused by the wrongful act or omission of the defendant.

Mears v. *L. & S. W. Ry. Co.* (1862) 11 C. B. N. S. 850.

Infringement of monopolies

891. An action may be brought for the infringement (intentional or unintentional) of any patent,[a] registered trade mark,[b] or copyright,[c] vested in the plaintiff; and the plaintiff's remedy may include an injunction in addition to, and an account in lieu of, damages.

(a) Patents and Designs Act, 1907, s. 34. (No damages can be obtained against the innocent infringer of a patent granted after 1st January, 1908 (*ibid.* s. 33); and, therefore (*semble*), no injunction (*Sarpy* v. *Holland* [1908] 1 Ch. 443).)

Queen v. *Halifax* [1891] 1 Q. B., at p. 796.

(b) Trade Marks Act, 1905, s. 40.

(c) Copyright Act, 1842, s. 15.

[The remedies for breach of copyright, which are purely statutory, include penalties, and even, in certain cases, seizure of the pirated copies. For further particulars, see under "Copyright" (Book III). A threat of proceedings for infringement of a patent is, unless followed up by action with due diligence, itself a ground

of action for damages and an injunction (Patents and Designs Act, 1907, s. 36; *Craig* v. *Dowding* (1908) 97 L.T. 683); and to the latter action *bona fides* is no defence (*Skinner* v. *Shew* [1893] 1 Ch. 413). A few trade-marks are still protected, even though not registered (Trade Marks Act, 1905, s. 42).]

Violation of confidence

892. An action for damages and an injunction lies against a person who

(i) publishes information, or makes use of materials, obtained by a person being (or having been) in a confidential relationship towards the proprietor thereof, without the latter's permission;

Tuck v. *Priester* (1887) 19 Q. B. D. 629.
Pollard v. *Photographic Co.* (1888) 40 Ch. D., at p. 349.
Lamb v. *Evans* [1893] 1 Ch. 218.
Robb v. *Green* [1895] 2 Q. B. 315.
Mansel v. *Valley Printing Co.* [1908] 1 Ch. 567.

(ii) publishes, without the authority of the composer or owner for the time being, letters, lectures, or other literary or artistic composition which have not been delivered to the public at large;

Tuck v. *Priester*, *ubi sup.*
Caird v. *Sime* (1887) L. R. 12 App. Ca. 326.
Macmillan v. *Dent* [1907] 1 Ch., at p. 120.

(iii) without the authority of the person by (or on whose behalf) he was employed to take a photograph, and without any statutory right, publishes copies of such photograph.

Pollard v. *Photographic Co.*, *ubi sup.*

Slander of goods

893. A person who maliciously publishes false and disparaging statements concerning the chattels personal of another,[a] or his title thereto,[b] or concerning the trade or business of another,[c] which statements cause actual pecuniary damage to that other,[d] is liable to an action for damages and an injunction at the suit of the party damaged. The action will survive to the latter's personal representatives, in so far as damage can be proved to have been caused to his estate.[e]

(a) *Wrenn* v. *Wield* (1869) L. R. 4 Q. B. 730.
Royal Baking Powder Co. v. *Wright* (1900) 18 R. P. C., at p. 99 (*per* Lord Davey), and p. 101 (*per* Lord James of Hereford).
(b) *Newman* v. *Zachary* (1670) Aleyn, 3.
Malachy v. *Soper* (1836) 3 Bing. N. C. 371.
Atkins v. *Perrin* (1862) 3 F. & F. 179.
Crampton v. *Swete* (1888) 58 L. T. 516.
(c) *Ratcliffe* v. *Evans* [1892] 2 Q. B. 524.
Trollope & Sons v. *London Federation* (1895) 72 L. T. 342.
(d) *White* v. *Mellin* [1895] A. C. 154.
(e) *Hatchard* v. *Mège* (1887) 18 Q. B. D. 771.

[Where the disparagement consists in threatening proceedings for the infringement of a patent, *bona fides* is no defence (*Skinner* v. *Shew* [1893] 1 Ch. 413).]

Proprietary rights

894. Where one person intentionally violates the right of property of another by an illegal act,[a] or, being under a duty towards another, negligently omits to perform such duty, whereby the goods or other personal property of that other are injured or lost,[b]

an action lies against the wrong-doer to recover the damage.

(a) *Exchange Telegraph Co.* v. *Gregory* [1896] 1 Q. B. 47.
National Phonograph Co. v. *Edison-Bell Co.* [1908] 1 Ch. 335.

[Do these cases amount to anything more than the violation of contractual rights?]

(b) *Anon.* (1674) 1 Vent. 264.
Whitfield v. *Despencer* (1778) 2 Cowp., at p. 765, *per* Lord Mansfield.
Hayn v. *Culliford* (1879) 4 C. P. D. 182.
Hooper v. *L. & N. W. Ry. Co.* (1880) 50 L. J. Q. B. 102.
Meux v. *G. E. Ry. Co.* [1895] 2 Q. B. 387.

[The scope of this action has been substantially curtailed in modern times; owing to the tendency to treat the liabilities of servants, innkeepers, common carriers, &c., as arising out of contract. But in the eighteenth century Digests it plays a considerable part. Where the damage is to land, *semble*, the case would be one of Nuisance.]

[NOTE ON SECTIONS II AND III.

It must, of course, be remembered, that the same facts often amount to two or more of the torts specified in these Sections, and that the plaintiff can, therefore, sue on one or all of them. For example, the same facts may shew both trespass and nuisance to land, or trespass, conversion, or detinue, in the case of chattels. But the importance of distinguishing between these various torts is: that the plaintiff, to succeed, must bring his case within *one* of them. And, sometimes, it will be better for him to prove one tort than another.]

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